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New York (State) Reports Supreme Court.

REPORTS

OF

Cases in Law and Equity

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF NEW YORK.

BY OLIVER L. BARBOUR, LL. D.

VOL. XLIII.

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DURING THE YEAR 1865.

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" 2. WILLIAM H. LEONARD.
" 3. GEORGE G. BARNARD.
" 4. THOMAS W. CLERKE.
" 5. JOSIAH SUTHERLAND.

SECOND JUDICIAL DISTRICT.

" 1. JOHN W. BROWN.†
" 2. WILLIAM W. SCRUGHAM.
" 3. JOHN A. LOTT.
" 4. JOSEPH F. BARNARD.

THIRD JUDICIAL DISTRICT.

" 1. HENRY HOGEBOOM.*
" 2. RUFUS W. PECKHAM.
" 3. THEODORE MILLER.
" 4. CHARLES R. INGALLS.

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" 1. PLATT POTTER.†
" 2. AUGUSTUS BOCKES.*
" 3. AMAZIAH B. JAMES.
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JUSTICES OF THE SUPREME COURT.

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" 2. LE ROY MORGAN.
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" 2. JOHN M. PARKER.*
" 3. CHARLES MASON.
" 4. RANSOM BALCOM.

SEVENTH JUDICIAL DISTRICT.

" 1. THOMAS A. JOHNSON.*
" 2. JAMES C. SMITH.
" 3. HENRY WELLES.
" 4. ERASMUS DARWIN SMITH.

EIGHTH JUDICIAL DISTRICT.

" 1. NOAH DAVIS.†
" 2. MARTIN GROVER.*
" 3. RICHARD P. MARVIN.
" 4. CHARLES DANIELS.

JOHN COCHRANE, *Attorney General.*

* Presiding Justice. † Sitting in the Court of Appeals.

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CASES

IN

Law and Equity

IN THE

SUPREME COURT

OF THE

STATE OF NEW YORK.

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The People of the State of New York *vs.* Hiram W. Bostwick and others.

A bond, for the payment of money, was executed by several persons at the same time, as sureties, upon the representation that another person, D., would sign it as co-surety, and with the understanding that B., one of the obligors, was to take the bond, but was not to deliver or use it until after it was signed by D. It appeared that some of the obligors would not have signed the bond, except on this condition, and that they did not otherwise authorize its delivery. B. delivered the bond to the obligee without having procured the signature of D. thereto. *Held*, that there was no valid delivery of the bond; that it was incomplete, and the transaction was not consummated; and that the condition on which the instrument was executed not having been performed, the obligors were not liable.

Held, also, that this was not a case where the rule that when one of two innocent parties must suffer, he who has employed the agent, and enabled him to commit a fraud, should be the loser, rather than a stranger, was applicable; the plaintiffs occupying the position of one taking a security to which the party giving it had no title.

The People *v.* Bostwick.

That if the rule of principal and agent applied, then the obligors would only be liable for such acts as they authorized. And the power given being conditional, and the condition on which its exercise depended not having occurred, and the delivery being entirely unauthorized, the principals were not bound.

APPEAL by the defendants, from a judgment entered upon the decision of one of the justices of this court, at the Albany circuit, in favor of the plaintiffs, on the 14th of March, 1863, for $15,531.65. On the 24th of December, 1855, the commissioners of the canal fund resolved to loan, and did loan, in the nature of a deposit, from premiums received on loans, to the Bank of Corning, the sum of $25,000, at an interest of five per cent. On the same day, the bank entered into a contract to take the loan on the terms proposed. The defendants thereupon executed to the people of the state of New York the bond on which this action was brought. The bond recited the making of the above loan by the commissioners of the canal fund, to the Bank of Corning, at an interest of five per cent, payable quarterly, upon the proviso, terms and conditions specified in a contract annexed to the bond, and bearing even date therewith. Then followed a joint and several covenant, on the part of the defendants, that the said bank should well and faithfully do and perform all things contained in said contract on its part to be done or performed, and should well and faithfully account for and pay over all money deposited with or loaned to it, or for which it should in any way become liable in and by said contract, according to the terms and provisions thereof. On the 31st of December, 1855, Mr. Bostwick, the president of the bank, delivered the bond to the auditor of the canal department, and the same was duly approved. Thereupon the sum of $25,000 was deposited for account of the sinking fund, pursuant to agreement.

On the 15th of April, 1858, the state treasurer drew upon the bank for the sum of $28,015.46, that being the amount

then due from the bank on account of this loan. Payment was refused, and the draft was duly protested.

On the 25th of March, 1859, this action was commenced, to recover a balance of $13,463.76 due on this bond, for so much of said deposit that had never been repaid. On the trial, the defendants, William Mallory, Thomas A. Johnson, George T. Spencer, Charles C. B. Walker and Almeron Field, set up as a defense, and insisted, that the loan was illegal, and that the bond taken as security for the money loaned was without authority and void. They also claimed that the bond was executed by all the defendants except Bostwick and Laurin Mallory, upon the condition that it should be executed also by Andrew B. Dickinson, before it was delivered, and that it was not so executed. The defendants testified, in substance, that the bond was signed by the defendants on the day it bears date, at the office of Mr. George T. Spencer, in Corning; that it was stated there, in presence of the signers, that Dickinson was coming there that day, (he lived six or seven miles from Corning;) that it was desirable that those present should execute the bond, so that Dickinson, when he came down, could execute it and not be delayed; that it was stated that Dickinson would sign it that same afternoon, before the same officer; that the defendants then all signed and acknowledged the bond, and made the affidavit of justification. That the bond, upon its face, was made to appear complete, no blank being left for Dickinson's name, either in the body of the bond, the acknowledgment, or in the affidavit of justification; that after the bond was thus executed it was delivered to Bostwick, the president, who was to get Dickinson to sign it; and he was not to deliver it, or use it, until Dickinson did sign it. Some of the defendants swore that they would not have signed the bond had it not been understood that Dickinson was to sign it; and that they had never waived that condition. It also appeared that Bostwick and the two Mallorys gave the other defendants a bond, indemnifying them against their liability on the bond in suit.

Bostwick testified that Dickinson arrived at the cars just in time to jump on the train with which he and Bostwick proceeded east together as far as Binghamton. There they separated, Dickinson promising to meet Bostwick at Albany, and sign the bond. Bostwick went to Albany, but Dickinson did not come. The bank was in need of the money, and he was anxious to go home; so he went to the auditor, (Mr. Cornell,) presented him the bond, and applied for and received the loan. He told the auditor that Dickinson would call and sign the bond, and the auditor replied that it was good enough as it was. There was no proof that the auditor, or any state officer, ever heard of the arrangement as to Dickinson signing the bond, or ever had the slightest reason for suspecting that the bond was not in all respects fair, regular and legal. The judge found the facts substantially as testified to by the defendants.

Judgment was entered in favor of the plaintiffs, and an appeal taken from the decision and judgment to the general term.

J. K. Porter, for the appellants.

H. Smith, for the respondents.

Miller, J. According to the finding of the court upon the trial of this cause, it appears that the bond upon which this suit was brought was executed by all of the defendants at the same time, upon the representation that another person was to sign it as co-surety, and with the understanding that one of them was to take the bond, but was not to use it until it was signed by the person who was thus to execute it. It also appears, that all the defendants but two would not have signed it except on this condition, and did not otherwise authorize its delivery.

It is contended by the counsel for the defendants who thus signed the bond conditionally, that there was no delivery

of it by or for them, and hence they are not liable. The question thus raised is one of considerable importance, not only in reference to the case under consideration, but in regard to the principle involved.

How far a party may be exonerated from liability under such circumstances is worthy of a full and careful investigation. The authorities upon the question appear, at first glance, to be conflicting, and it is important in the first place to examine the adjudications which have been made, and ascertain how far they have a bearing upon, or control, the points involved.

The plaintiffs rely upon several cases, which I will proceed to examine. The first and principal case to which our attention is called is that of *Millett* v. *Parker*, (2 *Met.* [*Ken.*] *Rep.* 608.) In that case the supreme court of Kentucky held that one who signs a covenant as surety, upon the condition and agreement, between him and the principal, that it is not to be binding upon him or delivered to the covenantee, unless another person shall also sign it, is bound thereby; although the principal to whom he intrusted it, delivered it to the covenantee without a compliance with such condition, of which and its breach, the latter had no notice. The learned chief justice who delivered the opinion discusses at some length the authorities which have a bearing upon the point involved, and questions the correctness of several of the cases which are relied upon to sustain a contrary doctrine. He arrives at the conclusion, that a delivery to the principal obligor, who is having the instrument executed for his own use, is in effect a delivery to the obligee, inasmuch as it enables the former, by delivering it to him, to apply it to the purpose for which it was designed. The case is a strong one in favor of the plaintiffs' theory, and if the principle there laid down is maintainable, it goes very far to sustain the position of the plaintiffs' counsel in the case at bar. I shall have occasion again to refer to this leading case, in the examination of the authorities which are questioned by it.

In *Butler* v. *Hamilton*, (2 *Dess. Ch. Rep.* [*S. C.*] 226,) a bill was filed to obtain relief against the liability of the complainant upon three bonds executed by him in 1789, together with another person, Daniel Bourdeaux, and as his security, to the commissioners of the treasury. The bill alleged, among other things, that the bonds were not signed by Joseph Atkinson, as they were to have been, and that it was incumbent upon the treasurers to whom they were payable to procure his signature, as the name of Mr. Atkinson was inserted in said bonds, and it was intended and meant, at that time, that the signature of Atkinson should have been affixed to the bonds. The complainant also claimed relief upon the grounds that the credit had been extended, by not urging the demands. That after the bonds were due and payable, he applied to know if they were paid to the treasury, by Mr. Bourdeaux, and was informed that on search they could not be found, and that they must have been paid; that if he had known that they had not been paid, he could have had an indemnity from Mr. Bourdeaux. He also alleged that, at the time, he had bonds and assurances of Mr. Bourdeaux, which were given up under the idea that the bonds to the treasury were paid, and under all the circumstances—the lapse of time, the gross laches of the officers of the state, and the leaving out of the name of Mr. Atkinson as was originally intended—it would be unreasonable to compel the complainant to pay the same. The answer of the defendants admitted the execution of the bonds, but stated the ignorance of the defendant of the facts charged in the complaint. Chancellor Rutledge, in his opinion, discusses the questions raised as to the extension of the credit, and of negligence, but does not refer to the point taken that Atkinson's name was omitted, and holds that, under the circumstances of the case, the complainant was not entitled to any relief, and dismissed the bill. Even if these bonds had been signed by the defendant conditionally, yet the facts alleged showed an acquiescence in their validity, which might

well be considered as controlling, and as precluding a defense of that character. Besides, there appears to have been no evidence as to the alleged omission, and that point was not distinctly raised and discussed, or fairly presented. The case by no means supports the doctrine contended for by the plaintiffs' counsel.

In *Graves et al.* v. *Tucker*, (10 *Smedes & Marsh.* 9,) the action was brought against the defendants upon a bond executed by them, conditioned that the defendant Graves, who had been elected treasurer of the state, should render a true account of moneys received by him, &c. One of the defendants pleaded that the bond was delivered to Graves as an escrow, upon the condition that two persons of solvency and wealth sufficient to pay the full penalty should sign, seal and deliver the same, besides those who had already signed it, and that blanks were left, where the names were to be filled. Similar pleas were put in by the other defendants, and there was a demurrer to one of the pleas, which was sustained. Upon the trial it was proved that Graves stated to one of the sureties that two other persons would execute the bond if he would, and he accordingly signed and sealed it. It was held that the pleas demurred to were insufficient. It will be perceived that the evidence did not show, as in the present case, a delivery of the bond to the defendant upon the condition that it was not to be delivered to the obligee until the other persons who, it was alleged, were to sign had executed it. Clayton, J. says, in reference to the plea demurred to: "It is not a plea of an escrow, for it does not aver that they executed the bond upon *any condition* whatever. That averment is indispensable, in a plea of an escrow. There is not any such fraud averred in the obtaining of the instrument as will render it void as to the defendants who rely on this plea. It does not allege that Richard S. Graves made any representations to him on the subject: his silence is the alleged ground of fraud." The learned judge makes a remark about the defendants' placing Graves

"in a situation by which he practised a fraud on the state, if they can be released," but I do not understand that the decision is put upon any such ground. In reference to the evidence he says: "On this part of the case, the only question is whether the evidence establishes the delivery of an escrow;" thereby assuming that if it did, the defense might be upheld. He also cites from 6 *Humphrey's Rep.*, to the effect that it is incumbent on the party who alleges it to be an escrow, to prove affirmatively, not that the principal promised something further affirmatively, *but that the performance of such act was the condition upon which he was to become bound or the instrument to be delivered as his act and deed.* In the case at bar, the condition upon which the bond was signed was proved to be that it was not to be used until after it had been signed by Dickinson; and it presents an entirely different state of facts from the one last cited.

In *Cumberlege et al.* v. *Lawson*, (40 *Eng. L. & Eq. Rep.* 228,) an action was brought for a breach of covenant in an indenture expressed to be made between G. of the first part, the defendant and two others, as sureties of G., of the second part, and the plaintiffs of the third part. G., the defendant, and two other sureties, jointly and severally covenanted to repay the plaintiffs moneys advanced by them to G. The defendant pleaded that he executed the indenture in the faith that P. (one of the sureties) should join therein, and execute the same; that P. never did join therein and execute the same. The plea was held to be bad. The decision was put upon the ground that the plea did not aver that the deed was executed conditionally and delivered as an escrow. Cresswell, J. says: "The defendant does not say that he never did seal or deliver; nor that he delivered the deed as an escrow on condition that Pierce should execute; nor that he was betrayed into sealing and delivering on the faith that he was not bound unless Pierce executed; and I can find nothing on the face of the plea to lead to the conclusion that there was any such stipulation. All the defendant says is,

that he executed the deed on the faith that Pierce should execute it. That is clearly not sufficient. If the defendant delivered the deed as an escrow, on condition that he was not to be bound unless Pierce executed it, he should have so pleaded." Crowder, J. expressed an opinion that when the defendant sought to avoid the effect of the deed he must show either that he delivered it as an escrow, not to take effect until a certain event had happened, or that he was induced by fraud to deliver it, or some other legal ground for getting rid of the effect of the deed. The decision in this case, in my opinion, falls far short of upholding the plaintiffs' case.

The authorities already discussed comprise all the cases which have been cited or which can be considered as supporting the doctrine contended for by the plaintiffs' counsel; and with the single exception of *Millett* v. *Parker*, I think, do not sustain any such position. So far then as the authorities are concerned, the plaintiffs must stand or fall upon the soundness of the principle laid down in that case.

On the other hand, numerous authorities are cited and referred to, which, it is claimed, sustain a different and a contrary rule, and which it is important to examine and consider.

In *Pawling and others* v. *The United States*, (4 *Cranch*, 219,) it was held that a bond may be delivered as an escrow, by the surety, to the principal obligor; and if one of the obligors, at the time of executing the bond, in the presence of the obligors, say, "we acknowledge the instrument, but others are to sign it," this is evidence from which the jury may infer a delivery as an *escrow*, by all the obligors who are present. The authority of this case is questioned in 2 *Met.* 608, by Ch. J. Simpson, upon the ground that it does not appear to whom the instrument was delivered, or who had the possession of it, at the time of its conditional execution. The statement of the case shows that the bond was given to Mr. Ballinger. The defendants pleaded that it was delivered to one Joseph Ballinger, to be safely kept until

signed by others, and then to be delivered to one Morrison, on behalf of the United States; that Ballinger, without its being thus executed, delivered it to Morrison. The evidence tended to establish that it was thus delivered, and the marginal note also shows it. It also appears that, upon the argument, the attorney general contended that the delivery as an *escrow* ought to have been to a *third person*, and not to Ballinger, *the principal* obligor. It is quite clear, from the report of the case, that the delivery was to the principal obligor, and the objection urged by the learned judge does not appear to be sustained.

It is also contended that the merits were not before the court, in that case, and the question was not presented. I think otherwise, as the very point was decided, that the condition not having been performed, the bond was an escrow.

In the *United States* v. *Leffler*, (11 *Peters*, 86,) in an action of debt upon a joint and several bond, the principal had confessed a judgment for the amount. The United States proceeded against the other defendants, and upon the trial, the principal in the bond, having been released by his co-obligors, was offered by the defendants and admitted by the court, as a witness to prove that one of the co-obligors had executed the bond on condition that others would execute it, which had not been done. The circuit court admitted the evidence, and it was held, on appeal, that there was no error in the decision on the trial. In 2 *Metcalf*, 608, before referred to, the authority of this decision is also questioned, and the judge who delivered the opinion there states that the legal effect of such a delivery was not discussed or considered, but was assumed by the court as being sufficient to make the instrument a mere escrow. It is true that it was assumed what the effect of the evidence was; but the case involved the very principle now presented for consideration, and I think is an authority in favor of the doctrine that such a defense as is interposed in the present case is available.

In *Bibb* v. *Reed*, (3 *Ala. Rep.* 88,) it was decided that a

bond may be delivered conditionally to a co-obligor, and will not be operative as a deed of the party, until the condition is performed. Ormond, J. in delivering the opinion of the court, says: "We are satisfied that on principle there can be no difference between a conditional delivery to a *stranger or a co-obligor;* that in either case the deed can not be operative until the condition is performed, and such is clearly the weight of authority at the present day." This case is also questioned by the learned judge in 2 *Metcalf*, but I think on no substantial ground, as it is manifest the question was directly raised.

In *Perry* v. *Patterson*, (5 *Humphrey*, [*Tenn.*] 133,) it was held that where a bill was delivered to the creditor by an obligor as surety, upon condition that another should sign as co-surety, it was delivered as an escrow, and was not obligatory unless the condition was complied with, or unless he agreed that it should be obligatory upon him, after his knowledge of the refusal of the other to sign as co-surety. It was also further held, that when delivered as an escrow, by a surety, to the principal obligor, and by the latter to the creditor absolutely and without condition, the ignorance of the creditor does not discharge the condition and constitute the delivery a valid delivery. It was the business of the creditor to have informed himself of the facts connected with the delivery. Turley, J. says: "The law upon this point is settled beyond controversy, and needs at this day no investigation." The case was a bill filed by a surety, to obtain relief from a note executed under an agreement that another person should sign the same; and on appeal the court reversed a decree of an inferior tribunal directing that the complainant, as surety, should pay one half of the note. It is an exceedingly strong case in favor of the defense interposed here.

In *Fletcher* v. *Austin*, (11 *Verm. Rep.* 447,) where a bond conditioned that P. should faithfully execute the office of deputy sheriff was signed by three only of the persons named in the body of the bond, and was not to be delivered to the

obligee until the others had signed, but was given to the obligee by P., and the others did not sign it while P. was deputy sheriff, nor until after a suit had been commenced thereon for the default of P., it was held that the persons who thus signed were not liable on the bond, nor were they rendered liable by the others signing it a long time after the default happened, unless they consented to such signing and delivery at the time. Williams, Ch. J. says: "If the bond contain the names of other obligors and is delivered without the signature of all, the obligee must inquire whether those who have signed consented to its being delivered without the signatures of the others. The cases of *Pawling et al.* v. *The United States*, (4 *Cranch*, 219,) *The United States* v. *Leffler*, (11 *Peters*, 86,) and 4 *Barn. & Ald.* 440, are authorities that this defense will avail those who thus sign a bond, if the other signatures are not procured."

In *Black* v. *Lamb*, (1 *Beasley's N. J. Rep.* 108,) it was held that parol evidence was admissible to show that previous to the obligor's singing the deed there was an agreement between the parties to an instrument, that all the stockholders of a company should sign it, and that it should not be delivered until the signatures of all were procured. In this case the foundation of the complainant's bill, and of the right to relief, was an indemnity bond, which the bill alleged was executed and delivered by the defendants to the complainants. The issue directed to be tried was whether the agreement set up in the bill was executed by the parties thereto, as their act and deed, unconditionally, or upon the understanding and agreement that the same should be executed by the remaining stockholders of the Delaware and Atlantic Rail Road Company before the same should be delivered as an agreement binding upon the subscribers, and whether the same was in point of fact legally delivered by the parties thereto, or by their authority. The jury found in favor of the defendants upon the question presented, and the plaintiffs moved for a new trial. Upon the argument of the

cause, one of the points taken by the plaintiffs' counsel was that the judge improperly admitted parol evidence to show that previous to the obligor's signing there was an agreement between the parties that all the stockholders should sign it, and that it was signed by the obligors with the understanding or agreement that it should not be delivered until the signatures of all were procured. The case is well considered, and the authorities bearing upon the question are elaborately and fully discussed. The chancellor says: "It would be difficult to find any well adjudged case where such evidence was held inadmissible."

In the *State Bank at Trenton* v. *Evans*, (3 *Green's N. J. Rep.* 155,) the subscribing witness to a bond testified, that at the time of its execution by the defendant, he said: "This bond is not to be delivered till signed by all the persons named therein;" and upon inspection of the bond it appeared that one of the obligors had not signed it. It was held that the bond could not be received in evidence. It was also decided, in the same case, that whether a party say, "I deliver this writing *as my deed*, in the confidence that you will not deliver it to the grantee until a certain condition be performed," or whether he say, "I deliver it to you *as an escrow*, to take effect as my deed upon a certain matter being done," it is in either case an *escrow*, and will be inoperative in the hands of the party, by whatever means he may get possession of the instrument, until the condition is performed. It is the performance of the condition, and not the second delivery, that gives it vitality and existence as a deed. In this case, the bond was delivered to the obligor for whose benefit it was signed by the defendants. The same condition was made a part of the execution as in the case under consideration, and it was not to be used until signed by all who by the arrangement were to become parties to it. Ch. J. Hornblower, in his opinion, reviews the authorities at some length, and remarks: "It is evident that the word *stranger* is used

by Lord Coke in opposition to the *party to whom* the deed is made. A delivery to a co-obligor, without words, would give no more effect to the instrument than delivery to a stranger with words." Ryerson, J. argues that there was no delivery, as delivery implies that the party who has sealed has given up the control of the writing, to and for the use of the other party. He says: "*The intention to deliver*, which is the essence of the transaction, is wanting. The intention to deliver this writing was never proved, but one quite different." Again he says: "A mere parting with the *actual* possession of a writing is very different from a legal delivery, which is to give it operation as a deed."

The remarks made by the learned judge are peculiarly applicable to the present case. There was certainly no *intention* to deliver the bond in suit until Dickinson had signed it; nor to part with the control of it for the use of the other party. And although possession was temporarily parted with, there was no legal delivery of it. On the contrary, it was executed in full faith that another party was to sign it, and with an express understanding that Bostwick was to take the bond, but *not to use it until after it was signed by Dickinson.* Could any thing be more explicit or clear than such an arrangement? If there ever was a case where the party was entitled to the benefit of an understanding of this nature, the present one is of that character, and comes directly within the principle laid down in the case last cited. That case is a strong authority in favor of the defense interposed; is well reasoned; fully indorses *Pawling et al.* v. *The United States*, (4 *Cranch*, 219,) as a direct adjudication upon the point; and is entitled to great weight in the disposition of this case.

The attention of the court has been directed to some English cases which are worthy of examination, and which uphold the doctrine contended for by the defendants' counsel.

In *Johnson and others* v. *Baker*, (6 *Eng. Com. L. Rep.* 479,) before the execution of a composition deed, it was

agreed, in the presence of the surety for the payment of the composition, that it should be void unless all the creditors executed it. The surety, at the same interview, afterwards executed the deed, in the ordinary way, without saying any thing at the time of the execution. The deed was then delivered to one of the creditors, in order that he might get it executed by the rest of the creditors. It was held that this was to be considered a delivery of the deed as an escrow, and that all the creditors not having executed it, the surety was not bound. The court say: "The conversation which, according to the evidence of Symes, took place immediately previous to the execution of this deed, must be taken as a part of the whole transaction; and if so, the subsequent delivery of the deed by the defendant was *conditional*, and not *absolute*, on his part, and then the defendant will be entitled to judgment."

In *Leaf and others* v. *Gibbs*, (4 *Carr. & P.* 464; 19 *Eng. Com. L. Rep.* 604,) it was decided, at nisi prius, that when a person signs a promissory note on a representation that others are to join, and one afterwards refuses to sign, the payees can not recover, in the action on the note, against the person who signed it, unless the jury are satisfied that such person, knowing the facts, and being aware of his rights, had consented to waive his objection. Ch. J. Tindal, in summing up the case to the jury, said: "It seems from the evidence of the plaintiffs' witnesses, that the defendant was told that his mother was to join, and therefore the obtaining of her signature was a condition, which if not carried into execution would justify the defendant in withdrawing, and if matters have not been altered since the signing of the note, the defendant will not be liable." The jury found a verdict for the defendant.

There are some other cases which tend, somewhat, to uphold the doctrine established by the authorities last cited, which it is not important to examine at length. (*See Sharp* v.

United States, 4 *Watts*, 21; *Fay* v. *Richardson*, 7 *Pick.* 91 *Lovett* v. *Adams*, 3 *Wend.* 380; *Gilbert* v. *North American Fire Ins. Co.* 23 *Wend.* 43; *Chouteau* v. *Suydam*, 21 *N. Y. Rep.* 179.)

With the numerous authorities discussed to sustain the position taken by the defendants' counsel, and with but a single case, so far as I have observed, upholding a contrary doctrine, there certainly should be some hesitation in overruling a long line of adjudicated cases, even if it be conceded that the application of the rule works serious injury in any single case.

While the doctrine contended for by the defendants may operate injuriously in some instances, to the party holding the security and who has received it in good faith, yet it is plainly apparent that a different rule might bind parties entirely contrary to their intentions; create increased liabilities in violation of the express condition upon which a bond or obligation has been signed, and thus work equal injustice. In the case at bar it should be noticed, that when the bond was delivered to the plaintiffs' agent, it was accompanied by a statement that another party would call and sign it. I do not, however, consider that this fact affects essentially the principle involved; although it shows that the case is not entirely free from evidence of notice which might put the agent upon his guard before he paid the money and the transaction was finally consummated.

It is said that if the defendants, who selected the person to whom they would entrust the bond, were deceived by him, and he has delivered it when they did not intend he should, they, and not innocent holders, should bear the loss. This is undoubtedly a correct rule, in reference to negotiable paper, in certain cases. (*White* v. *Springfield Bank*, 3 *Sand. S. C. Rep.* 229. *Agawam Bank* v. *Strever et al.* 16 *Barb.* 82. 18 *N. Y. Rep.* 502.) But this is not a case where the rule is applicable that "when one of two innocent parties must suffer,

he who has employed the agent and enabled him to commit a fraud, should be the loser, rather than a stranger." The plaintiffs occupy the position of taking security to which the party giving it had no title. The defendants were merely sureties, and derived no benefit from the contract. If the rule of principal and agent applies, then the defendants would nly be liable for such acts as they authorized. (*Farmers & Mechanics' Bank of Kent Co.* v. *Butchers & Drovers' Bank*, 16 *N. Y. Rep.* 149, 150.)

Besides, the power conferred in this case was conditional, and the condition not having occurred on which its exercise depended, and it being entirely unauthorized, the principal would not be bound. (*Mechanics' Bank* v. *New York and New Haven Rail Road Co.*, 3 *Kern.* 634, 635.) See, also, authorities before cited, holding that the surety is not liable under similar circumstances.

An agent can not bind a party contrary to his instructions, and a special authority must be strictly pursued. (*Davenport* v. *Buckland, Hill & Denio's Sup.* 75. *Batty* v. *Carswell*, 2 *John.* 48. *Nixon* v. *Palmer*, 8 *N. Y. Rep.* 398. 3 *Kern.* 631, 637.)

In the case at bar, there was no delivery of the bond upon which this action was brought, by the sureties who now defend. It was merely left with Bostwick, upon condition that he was not to use it for the purposes intended until after it was signed by another party. It was therefore incomplete, and the transaction was not consummated. Under such circumstances, the authorities clearly hold that a person who has signed an instrument is not liable until the condition is fulfilled; and it makes no difference that he was one of the parties to it.

I think, therefore, that the judge erred, at the circuit, in holding that the bond was legal, valid and binding upon the defendants.

The conclusion to which I have arrived upon this point renders an examination of the other questions presented

unnecessary; and for the reasons given, a new trial must be granted, with costs to abide the event.

HOGEBOOM, J. concurred.

PECKHAM, J. expressed no opinion.

New trial granted.

[ALBANY GENERAL TERM, December 7, 1863. *Hogeboom*, *Peckham* and *Miller*, Justices.]

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DUBOIS *vs.* HULL, impleaded, &c.

A vendor's lien upon the land sold, for the purchase money, can only be waived by taking collateral security, or by an express agreement to that effect. The party disputing the lien must show that the vendor agreed to rest on other security, and to discharge the lien.

The principle of equitable lien is founded on the presumed intention of the parties.

The law presumes an intention on the part of the vendor to retain his lien for the purchase money, and imposes upon the purchaser the burden of proving the contrary.

The plaintiff, by his agent, proposed to sell a piece of land to a corporation, and to receive in payment therefor stock of the company to a specified amount. A committee of the corporation made a report recommending the acceptance of this proposition, which was adopted; but no further steps were taken to pay for the land in stock, nor was any stock ever issued to the plaintiff, or to any person for his benefit. The plaintiff conveyed the land to the corporation, but the consideration money was never paid. *Held* that the circumstances of the case did not show a waiver of the vendor's lien for the purchase money. Nor did the fact that the vendor had put his demand, for the purchase money, into a judgment before attempting to enforce the lien, evince an intention to waive it.

At most the obtaining of a judgment for the purchase money can only be regarded as a circumstance to show the intention of the vendor to waive the lien, bearing upon the question whether there was a waiver, or not.

Where the vendor has recovered a judgment for the purchase money, it is no

defense to an action to enforce his equitable lien, that he has not issued an execution upon the judgment.

Although a corporation has no power, under the statute, to give any lien on its real estate, by its own act, a lien may be created, by operation of law, upon land purchased by it, in behalf of the vendor.

THIS action was brought for the purpose of enforcing an equitable lien which the plaintiff claimed, for the unpaid purchase money of certain lands in Greene county. On the 18th of September, 1860, the plaintiff conveyed to the defendant, The Manhattan Ice Company, said real estate, owned by him, for the consideration of $2000. It is alleged in the complaint, and the proof shows, and it was found by the referee, that this consideration was never paid.

On the 20th of December, 1860, the defendant Hull recovered a judgment against the Manhattan Ice Company, for $244.75, which was docketed in Greene county, December 21, 1860. On the 24th of January, 1861, the defendant Hull recovered another judgment against said company, for $309.44, which was docketed in Greene county, January 26, 1861.

On the 28th of March, 1861, the plaintiff recovered a judgment against said Manhattan Ice Company, for the sum of $2139.96; said judgment being for the unpaid purchase price or consideration of the conveyance of said real estate. No execution was ever issued on this judgment of the plaintiff. In March, 1862, executions were issued to the sheriff of Greene county, on the two judgments recovered by the defendant Hull. On the 3d day of May, 1862, the said real estate was sold, under said executions, to Albert Brett, for $280.86. On the 25th of March, 1862, this action was commenced. The sheriff of Greene county was made a party defendant in the action. The plaintiff, in his complaint, claimed that he had an equitable lien on the lands sold, for the payment of the consideration money, and asked for a decree restraining the defendants, Hull and the sheriff, from selling said real estate, and to have the plaintiff's judgment

declared a lien thereon, prior and superior to the judgments of the defendant Hull.

On the trial the plaintiff moved to amend the complaint by striking out the concluding portion which asked that the plaintiff's judgment be declared a lien, superior to the other judgments, and by inserting in the place thereof a demand for the establishment of the plaintiff's lien for said consideration money, and for the payment of the same by a sale of the premises. In the course of the trial, and before the referee had decided the motion, the plaintiff's counsel left the place of reference, and afterwards returned with an appearance from the attorney for the Manhattan Ice Company, and a consent allowing said amendment, dated September 22, 1862. The referee allowed the amendment. The defendant offered to prove, on the trial, that the real estate in question was wholly paid for by Henry Dubois, the father of the plaintiff, and was held by the plaintiff to protect it from his father's creditors, and for his benefit. This evidence was objected to, and excluded by the referee. The other points and exceptions taken on the trial appear in the opinion. The referee reported in favor of the plaintiff. The usual decree was made, and entered, and the defendant Hull appealed to the general term.

Coe & Wallis, for the appellant.

Joseph Hallock, for the respondent.

By the Court, MILLER, J. The consideration money upon the sale of the land conveyed by the plaintiff to the Manhattan Ice Company not having been paid, the law attaches a lien upon the real estate for the amount, unless the circumstances surrounding the case show that the lien was waived. The principle of equitable lien is founded upon the presumed intention of the parties; although it often happens that they

knew nothing about the rule, and did not expect any such security.

It is claimed by the counsel for the defendant that the lien was waived, and that the plaintiff intended to rely upon the personal credit of the company. There is evidence in this case to show that the negotiations were made and conducted by Henry Dubois, the father of the plaintiff, who was one of the trustees of the ice company, and who, the plaintiff claims, acted as his agent in making the sale. The proceedings of the trustees, which were introduced upon the trial, show that Henry Dubois proposed to sell the property to them and to receive in payment therefor stock of the company to the amount of $2000, and the report of a committee, recommending the acceptance of that proposition, was adopted. No further steps were taken to pay for the land in stock, nor was it ever issued to the plaintiff, or to any person for his benefit. The plaintiff testifies that no part of the consideration money was paid to him, and that the company were to pay him in cash, as he understood it. The treasurer of the company swears that the real estate was never paid for; that the company never issued and there never was any agreement to issue any stock to the plaintiff, at any time, or that he was to be paid for the land or any part of it, in stock.

No stock having been issued, and the proposition to pay in stock never having been executed, if any such there was, the company had entirely failed to complete the arrangement alleged to have been made, and hence it can hardly claim the benefit of it in this case. Independent of this view of the matter, the evidence was certainly conflicting upon the question of fact whether any such arrangement was made; and the referee having found against the plaintiff, upon that point, his finding must be regarded as conclusive and binding.

Even if the evidence had established a parol agreement to take pay for the land in stock, I think as it never was enforced it would not have been sufficient to establish a waiver of the lien. It could only have been waived by taking col-

lateral security, or by an express agreement to that effect. The party disputing the lien must show that the vendor agreed to rest on other security, and to discharge the lien. (*Willard's Eq. Jur.* 124, 443. *Fish* v. *Howland*, 1 *Paige*, 24, 30. *Garson* v. *Green*, 1 *John. Ch.* 308.)

In the case last above cited, by an agreement in writing a part of the consideration money was to be paid by the purchaser's note at fifty-five days, and the lien was sustained. The circumstances showing that the lien was not intended to be reserved must, within the authorities cited, be circumstances constituting a part of the contract. The plaintiff is deemed not to have parted with the premises, to the extent of the lien; and as Chancellor Kent says in 4 *Kent's Com.* 152: "The vendee becomes a trustee to the vendor for the purchase money." In *Hallock* v. *Smith*, (3 *Barb. S. C. Rep.* 272,) Strong J. says: "If the vendor take a note or bond from the vendee, for the purchase money, that is no waiver of the lien, for such instruments are only the ordinary evidences of the debt." The law presumes an intention to retain the lien, and imposes upon the vendee the burden of proving the contrary. (1 *Hilliard on Mort.* 483.) Even if it be doubtful under all the circumstances, whether the lien has been displaced or waived, the lien attaches. (*Story's Eq. J.* § 1224.)

Applying the principles established, to the case under consideration, I think that the circumstances of the case do not show a waiver of the lien, even if that question of fact, after the decision of the referee, was an open one. Nor does the fact that the plaintiff had put his demand into a judgment, before attempting to enforce the lien, evince an intention to waive it. It has never been held that obtaining a judgment for a portion of the purchase money of real estate waived the lien. This was a *legal* remedy, which the party had a right to pursue, and I see no good reason why it should interfere with the *equitable* remedy, or that by resorting to it the party evinced an intention to abandon his claim in equity.

A holder of a bond and mortgage may sue upon the bond, without waiving his equitable remedy by a foreclosure of the mortgage.

It was held in *Crippen* v. *Heermance*, (9 *Paige*, 211,) that where a bond and mortgage was void for usury, the original debt due on the contract for a sale of the premises was not merged therein, but remained an equitable lien on the land, as a part of the purchase money due upon such contract. The obtaining of a judgment was not taking an additional security of the purchaser, as the Manhattan Ice Company had no personal property out of which the amount could be realized, nor any real property except the land in question. The taking of a bond or note does not discharge the lien, and there is no good reason why the prosecution of a bond or note of itself should have that effect. According to the authorities before cited there must be an express agreement to waive the lien, or the vendor must receive some substantial equivalent or security in the place of it; so as to show an intention to waive it. At most, the obtaining of a judgment for the consideration money can only be regarded as a circumstance to show the intention of the party to waive the lien, bearing upon the question of fact submitted to the referee, whether there was a waiver.

It is said that by the statute, (3 *R. S. 5th ed.* 273, § 6,) no proceedings can be had in an action to enforce the lien until an execution on the plaintiff's judgment is returned unsatisfied in whole or in part. I think that this provision has no application to proceedings to enforce an equitable lien. The article containing this section is entitled "Of the powers and proceedings of the court upon bills for the foreclosure and satisfaction of mortgages." Although an equitable lien has some of the characteristics of a mortgage, yet a proceeding to enforce it is a common law remedy, which is not governed by the statutory provisions referred to, and many of them would be entirely inapplicable. It is therefore no defense to the action that no execution was issued upon the judgment.

It is further objected that the Manhattan Ice Company had no power to create this equitable lien. That under the statute it could hold real estate, but it had no power "to mortgage the same, or to give any lien thereon." (2 *R. S. 5th ed.* 658, § 20.) I think the answer to this position is that the company did not execute any mortgage, or give any lien on the real estate. The lien was created by operation of law. The conveyance by the plaintiff to the company created the lien, and the company held the real estate as trustee for the vendor, for the purchase money which was unpaid. (4 *Kent's Com.* 154.) The statute could have no effect upon it in any way. At the time of the conveyance the plaintiff retained an interest in the land, to the amount of his lien. It could not therefore have been assumed by the plaintiff that the statute had any application, or that he contracted with knowledge that it in any way affected his rights.

The offer to prove that Henry Dubois, the father of the plaintiff, paid the whole consideration money of the farm of which the premises in question were a portion, and that they were conveyed to the son to protect them from his father's creditors, and for his benefit, was properly overruled. (1.) No such issue was made by the pleadings in the case. (2.) The answer admitted that the plaintiff was the owner of the premises, at the time of the conveyance. (3.) The Manhattan Ice Company, by accepting a conveyance from the plaintiff, admitted his ownership, and I think it is thereby estopped from interposing any such defense. (4.) The evidence could have no bearing upon the questions litigated, and was not admissible.

I think no error was committed by the referee, in allowing the amendment to the complaint proposed by the plaintiff. All the parties were represented, and there was no such variance as could not be supplied under the liberal provisions of the code, §§ 169, 170. There is no pretense that the defendant was misled, and the complaint may be considered

as amended so as to conform to the proof. (*Code*, § 173. *Wright* v. *Whiting*, 40 *Barb.* 235. *Denman* v. *Prince*, *Id.* 213.) Even on appeal the court may treat the pleadings as amended in conformity with the evidence, in any respect in which the court ought clearly to allow an amendment at special term. (*Bowdoin* v. *Coleman*, 3 *Abb. Pr. Rep.* 431 *Harrower* v. *Heath*, 19 *Barb.* 331. *Bate* v. *Graham*, 1 *Kern.* 237. *Pratt* v. *Hudson River Rail Road Co.*, 21 *N. Y. Rep.* 305.)

The referee properly exercised his discretion in allowing the amendment.

For the reasons given, the judgment entered on the report of the referee must be affirmed with costs.

[Albany General Term, December 7, 1863. *Hogeboom*, *Peckham* and *Miller*, Justices.]

Allamon *vs.* The Mayor &c. of the City of Albany.

The plaintiff and defendants entered into a written agreement by which the former agreed, for a certain sum to be paid him by the latter, to do all the carpenter's work upon a school house to be erected, and to furnish and use all the requisite materials; and that he would commence said work, and would "proceed therewith, without delay, and in such a manner as not to delay the contractor for the mason work." *Held* that this latter covenant raised an implied obligation on the part of the defendants to have the building in readiness for the plaintiff to perform the condition.

Held, also, that this was a mutual covenant, on both the parties; on the part of the plaintiff that he would commence and proceed at once, and on the part of the defendants that they would be ready to allow him to do so.

And that the plaintiff having sustained damage by reason of the defendants' delay in having the building ready for him to do the work stipulated, he could maintain an action to recover the amount.

Held, further, that the plaintiff did not waive the defendants' breach of the contract, by going on, without complaint or objection, and completing the work. That he had a right to proceed with it, after the breach, and compel the defendants to pay the increased expenses incurred by reason of the delay.

And that an action to recover such increased expenses might be maintained upon a *quantum meruit*, independent of the contract.

Held, also, that the plaintiff having been delayed in the performance of his contract by the act or omission of the defendants, until wages were higher, and the prices of materials increased, he was entitled to recover the additional amount he was obliged to expend, in completing his contract.

APPEAL from a judgment entered upon the report of a referee. The action was brought to recover damages for an alleged breach of a contract made and entered into between the plaintiff and the defendants on the 15th day of March, 1856, by which the plaintiff agreed, for a certain sum to be paid him, to do all the carpenter's work upon a school house to be erected in the ninth ward of the city of Albany, and to furnish and use all the requisite materials necessary to be furnished, &c. The contract contained a covenant, which was as follows: "And will commence said work and will proceed therewith without delay, and in such a manner as not to delay the contractor for the mason work." The plaintiff claimed to recover damages by reason of the failure on the part of the defendants to have the building in such a state of readiness that the plaintiff could go on and commence his work "without delay, and in such a manner as not to delay the contractor for the mason work." The complaint alleged a delay of three months in having the building in readiness, after the taking of the contract, and by reason thereof the plaintiff was compelled to do most of his work through short days of the fall and winter, and the price of materials rose greatly. That after making the contract he employed a large number of men to assist, whom he was obliged to pay although unable to use them. Upon the trial it was proved that the work was commenced in June, 1856, and finished in July, 1857. The plaintiff proved several items of losses by reason of detention, increased price of materials, difference in men's time whether the work was done in the summer or winter, &c., amounting, as he claimed, to $1220. It also appeared that the contract was assigned to James D. Wasson as collateral security for money loaned

to the plaintiff, and that the plaintiff gave him a receipt, in *full payment of the contract.* Various questions were raised in the case, which will appear in the opinion. The referee reported in favor of the plaintiff for $725.13. Judgment was entered on his report and the defendants appealed.

S. Hand, for the appellants.

L. Tremain, for the respondent.

By the Court, MILLER, J. By the terms of the contract between the plaintiff and the defendants, for a breach of which a recovery was had in this action, no definite time was fixed for the completion of the plaintiff's work under it, but it contained a covenant by which the plaintiff was bound "to commence said work and proceed therewith without delay, and in such manner as not to delay the contractor for the mason work." It will be observed that here was a positive engagement on the part of the plaintiff as to the manner in which he was to proceed with the performance of the work he had agreed to do, and a direct promise and obligation on his part that he should commence at once and proceed without delay to its completion. If the plaintiff had failed to proceed with the work and fulfill this provision of the contract without delay, he would most certainly have been liable for any damages which may have accrued to the defendants, unless the delay was caused by the default of the defendants. This covenant in the contract was, to a considerable extent, for the advantage and benefit of the defendants, and contemplated a prompt and speedy performance of the work contracted for. The plaintiff, being thus bound by his agreement, commenced and proceeded with the job without delay, and was liable in damages for a non-performance of the covenant, which obligated him to do so. The question arises whether there was not a corresponding obligation on the part of the defendants, implied from the contract itself,

that they were to have the building upon which the work was to be executed, in readiness for the plaintiff, so as to enable him to commence and fulfill this provision of the contract. Was it a provision which bound the plaintiff alone, with no agreement whatever on the part of the defendants that they were to have the building in such a condition as to enable him to fulfill the contract? If it was thus confined in its character, it would be a contract merely on one side, with no corresponding obligation, no duty to be performed on the part of the other contracting party. There would be no mutuality in such a covenant, if thus limited in its operation and effect. While on the one hand the plaintiff would be bound to incur liabilities, expend money and make arrangements to complete the contract and perform its conditions, and thereby subject himself to large expenses and losses; on the other, the defendants would be free from all liability, entirely exonerated from all obligations, and permitted to remain quiet, without doing a single thing to enable the plaintiff to perform his contract.

Suppose the plaintiff had proceeded, as he had a right to do, and provided the materials necessary to perform the work, and the defendants failed to provide the building so that he could use them until they became depreciated in value, and caused serious loss to the plaintiff; can there be a doubt that the defendants would be liable? Again: suppose they had not provided any building whatsoever, so that the plaintiff was utterly unable to perform this condition, and was damaged greatly thereby; could they then be exonerated? If they had a right to delay three months, then they were equally authorized to delay for a year, or forever, and the plaintiff was without any redress whatever. In such a view of the question, the contract was utterly void as to the defendants, while the plaintiff was bound to perform it, and was liable for any failure to do so.

I think the covenant on the part of the plaintiff, to commence the work and proceed therewith without delay, raised

an implied obligation, on the part of the defendants, to have the building in readiness for the plaintiff to fulfill this condition. By entering into such a contract the defendants agreed that they would be prepared for its performance, and it is to be assumed that the very thing essential for that purpose constituted an element of the agreement. It was a mutual covenant, binding upon both the parties; on the part of the plaintiff, that he would commence and proceed at once; and on the part of the defendants, that they would be ready to allow him to do so. Without such a mutual contract neither party could be bound; the plaintiff might take his own time, and proceed at any time he deemed best, and the defendants were not bound to provide the building for the purpose of having the work done.

The principle decided in *Holmes* v. *Groff*, (3 *M. & W.* 38.) appears to be applicable to the case at bar. There the defendants were not allowed a deduction under the contract from the contract price, for the non-completion of the building within the specified time, because they were unable to give possession of the building to the plaintiff for some weeks. There was no express provision in that contract, that the defendants should give possession, in so many words, but it was essential for its performance; such is precisely the case here. Until the building was in readiness, it was utterly out of the power of the plaintiff to perform.

It is said that there was no breach of the contract, and that it only imposed upon the defendants a single duty, and that was to pay the plaintiff for his work. I think otherwise. It would certainly be remarkable if, with a positive duty imposed upon the plaintiff, no corresponding obligations rested upon the defendants. Nor is it adding any thing to the written contract, to infer an implied obligation to do what was actually intended, and what was absolutely essential to give force, effect and vitality to it. Without this, it would be entirely useless and ineffective for any purpose. The case stands thus: The defendants desired that the plaintiff

should do the work in question; it could not be performed without the building was in readiness for that purpose; the plaintiff agreed to commence the work, and proceed with it without delay. It necessarily follows that the defendants were to furnish an opportunity to carry out the contract, and impliedly agreed to do so. There being an obligation on the part of the defendants which was not performed by them, and the plaintiff having sustained damages by reason of such non-performance, it follows that the action was properly brought.

It is said that the plaintiff waived the alleged breach of the contract, by going on without complaint or objection and completing the work, some three months after the execution of the contract. I think there was no waiver by proceeding with the contract, the failure of the defendants to have the building ready for him preventing his going on with it at an earlier day. He had a right to proceed with it afterwards, and compel the defendants to pay the increased expenses incurred by reason of the delay. Where a party was prevented from the performance of a contract within the stipulated time by the omission of the other, and subsequently performed the work agreed upon at a higher price, *it was held*, that he was not obliged to bring his action on the contract, but might resort to the *quantum meruit* to obtain his indemnity. (*Dubois* v. *The Delaware and Hudson Canal Co.*, 4 *Wend.* 285.) The court also held in that case, that if the work was more expensive, the additional expense thus incurred should be added to the contract price. The loss may have been far greater to abandon the contract entirely, than to proceed with its execution so far as practicable; and under the authority cited, the actual damages would not be confined to his actual loss at that time. Nor do I understand that the authorities referred to by the defendants' counsel hold any such doctrine, under circumstances similar to the present case. (*See* 17 *John.* 357; 7 *Hill*, 61.) The plaintiff had, I think, a perfect right to proceed to fulfill the con-

tract, and the defendants, as they had failed to perform it, were liable for all damages incurred by reason of his doing so.

It is further urged that the assignment of the contract to Wasson, and Wasson's receipt in full, deprives the plaintiff of all claim arising from a breach of it. There is evidence to prove that the contract was never assigned absolutely, but only as collateral, and that before suit brought Wasson was paid in full. The referee has found, that at the time of the commencement of this suit the plaintiff was the absolute owner of the claim, and that it has never been paid. The receipt given by Wasson was in payment for the contract price, and under all the circumstances may be considered as embracing only the money due upon the contract. Besides, this is an action to recover damages by reason of the defendants failing to fulfill their contract, and payment of the contract price can scarcely be considered as a bar to such an action. Although the claim originated out of the contract itself, yet the action arises from a failure to fulfill it, on the part of the defendants, and may be maintained upon a *quantum meruit*, independent of the contract.

It is also insisted that the referee erred as to the measure of damages; that the higher price paid by the plaintiff for work and materials, owing to the later day at which the plaintiff commenced his work, can not be recovered; and that the short days in winter, or the cold weather, were not proper to be taken into consideration. In reference to the first branch of the objection, I think the case is distinguishable from those cited by the defendants' counsel. (7 *Hill*, 61. 2 *Sold.* 85.) In the first case, (7 *Hill*, 72,) in estimating the damages, it was assumed that the plaintiffs were necessarily compelled to break up all their sub-contracts, as a consequence of a breach of the principal one, and that this was to be considered in settling the amount of damages, which was held to be erroneous. No such question arises in the present case. The plaintiff was not necessarily bound to purchase the materials before they were required for use; and the evi-

dence does not show that the labor could be obtained at any lower rate or more advantageously than it was. In regard to the short days in winter, and the cold weather, I think so far as they caused an increased expenditure they were proper to be taken into consideration. The delay arose in consequence of the omission of the defendants to perform their part of the contract, and there is no good reason why they should not pay for increased expenses, which they were instrumental in producing. The referee has found, that in consequence of the delay the wages were necessarily higher, and the price of materials increased, and I think he adopted the proper rule as to damages.

For the reasons given, a new trial must be denied, and the judgment entered on the referee's report affirmed, with costs.

[Albany General Term, March 7, 1864. *Potter*, *Miller* and *Ingalls*, Justices.]

Fitch *vs.* Carpenter and others.

Contracts were entered into between the plaintiff and defendants, dated respectively October 17, and October 26, 1861, by the first of which the plaintiff agreed to deliver to the defendants 1000 tons of hay at $10 per ton, and by the second he agreed to deliver from 300 to 500 tons at $11 per ton. The hay was to be delivered at Albany, and to be good, merchantable, shipping hay, in good order, in bales averaging 300 pounds. Hay was delivered to, and accepted, by the defendants' agent at Albany upon these contracts. The defendants insisted that a considerable portion of the hay so delivered was not of the quality provided for by the contracts. *Held* that the question as to what was included or excluded from the terms employed in the contracts was open to evidence for the purpose of showing what was intended by the use of the terms employed.

Held, also, that there being a question of fact involved, whether the hay delivered was of the quality which the contracts called for, in regard to which there was a conflict in the evidence, and which question had been decided by the referee, his decision was final.

Held, further, that the plaintiff having delivered the hay, at Albany, accord-

ing to the conditions of the contracts, and the defendants having accepted it with a knowledge of a deficiency in the weight of the bales, and without objection, at the time, they had waived a right to urge that the hay did not conform to the contracts, and to claim a deduction from the price on that account.

And that it was competent to show that the defendants had waived the provision in the contracts, requiring the bales to average 300 pounds each.

THIS was an appeal by the defendants from a judgment entered upon the report of a referee in favor of the plaintiff, for the sum of $2052.28. The action was brought to recover the balance due for a quantity of hay sold and delivered by the plaintiff to the defendants. The first contract was dated October 17, 1861, and was for the delivery of 1000 tons, at $10 per ton. The second contract was dated October 26, 1861, and was for the delivery of from three hundred to five hundred tons, at $11 per ton. The hay was to be delivered at Albany, and to be good, merchantable shipping hay, in good order, in bales averaging 300 pounds. The cause was referred to Albert S. Robinson, Esq. and was tried before him. The referee found that the hay was delivered and received according to the contracts, and reported in favor of the plaintiff. The defendants claimed that the hay delivered was of an inferior quality, and the bales did not average 300 pounds. The defendants introduced several witnesses to show that the terms "good, merchantable shipping hay" had a definite meaning and excluded clover hay; and that a considerable portion of the hay had clover mixed up with it; that they notified the plaintiff that the hay was not according to contract, and that they had rejected it at New York, and had it stored on the plaintiff's account. Also evidence to show that that plaintiff had promised to make deductions, which was denied and contradicted.

The plaintiff introduced evidence to show that the hay had been accepted by the defendants' agents at Albany, and was not rejected for its alleged defective quality, or because of the weight of the bales being less than was provided for. He also proved that the defendants had consented to waive

the defect in weight, and that at the time of making the contracts, mixed hay and clover were mentioned as coming within the contracts. The evidence was conflicting upon all the questions of fact. The questions raised are presented in the opinion of the court. Upon judgment being entered, the defendants appealed to the general term. The case was submitted on written points.

Bromley & Bovee, for the appellants.

J. H. Reynolds, for the respondent.

By the Court, MILLER, J. In this case the referee has found that, in pursuance of the two contracts introduced in evidence upon the trial, the plaintiff sold and delivered to the defendants, and the defendants received under the contracts, 1000 tons of hay at $10 a ton, and 238 tons at $11 per ton, and rendered a judgment in accordance with this finding, in favor of the plaintiff.

It is insisted by the defendants' counsel that a considerable portion of the hay sent to New York was not of the quality provided for by the contracts, and was not "good, merchantable shipping hay," within the meaning of that phraseology. Several witnesses were introduced by the defendants to prove that this expression included timothy and red top, only, and excluded clover; and that the plaintiff was not entitled to recover contract prices, which the referee allowed for such hay.

The question as to what was included or excluded from the terms employed in the contracts, was, on the trial, open to evidence for the purpose of showing what was intended by the use of the words employed. It appeared that at the time the contracts were made, clover was mentioned as among those kinds of hay answering the description of good, merchantable shipping hay. The plaintiff claimed, and his evidence tended to show, that the hay delivered and received was substantially of the quality which the contracts called

tor. Although the evidence of the defendants was directly to the contrary, yet it is somewhat apparent that there was a question of fact involved in regard to which there was a conflict in the evidence, and which having been decided by the referee, his decision is final.

This view of the question disposes of the main point raised by the defendants; but even if upon that point there is still room for doubt or discussion, I am inclined to think that the plaintiff having delivered the hay at Albany, according to the conditions of the contracts, as the referee has found, and the defendants having accepted it with a knowledge of the deficiency and without objection, at the time, they have waived a right to urge that the hay did not conform to the contract, and to claim a deduction from the price on that account. (*Pars. on Cont.* 326, 327. *Sprague* v. *Blake*, 20 *Wend.* 61. *Hart* v. *Wright*, 17 *id.* 277.)

The hay was to be delivered at Albany, and was there delivered, as is conceded, to the agents of the defendants. There is some evidence to show their acceptance of it, thereby assenting to the fact that the terms of the contracts, on the part of the plaintiff, had been carried out and fulfilled, and that the defendants were satisfied. The referee has found against the defendants on this point, and there is certainly no such preponderance of evidence in their favor as would justify an interference with his decision for that reason.

It is no answer to say that the hay was rejected on its arrival in New York, and stored for the plaintiff. The finding of the referee settles the question the other way; and it was too late afterwards to claim that it did not answer the contracts.

It is said that the referee manifestly erred in receiving evidence to vary the written contract, as to the weight of the bales and as to the quality of the hay. I think no improper evidence was received as to the quality of the hay, and that it was competent to show that the defendants waived the

provision in the contract requiring the bales to average 300 pounds each. If they chose to accept bales of a lighter or different weight than was provided for, it was proper testimony to submit to the referee upon the question whether this provision of the contracts had been waived.

The whole matter involved in this case was mainly a question of fact, in regard to which there was a dispute, and the evidence was certainly conflicting. There was no error committed on the trial, and the judgment entered on the referee's report should be affirmed with costs.

[Albany General Term, March 7, 1864. *Peckham*, *Miller* and *Ingalls*, Justices.]

Gage, executor &c. *vs.* Hill and wife.

Where it appears, in an action before a justice of the peace, that the title to land is in question, and that such title is disputed by the defendant, the justice is prohibited from taking cognizance of the action, and is bound to dismiss it.

If he proceeds in the suit, after it appears that the title to land is in question, and is disputed, his proceedings are without authority, and his judgment void, for want of jurisdiction.

Evidence of the proceedings and judgment in such an action is not admissible in a subsequent suit between the same parties, for the purpose of establishing the fact that the question involved in the latter suit had been decided in the former action before the justice, and that the judgment there was conclusive, and the controversy in the second suit *res adjudicata*.

In order to render a judgment, on a fact or title distinctly put in issue, an estoppel, in another action between the same parties and their privies, in reference to the same subject matter, it is essential that the tribunal which passed upon the question in the former suit should have had jurisdiction.

APPEAL from a judgment entered upon the report of a referee. This action was brought for an alleged assault and battery, committed by the defendant Maria Hill upon Anna German, deceased, of whom the plaintiff is executor.

The plaintiff claimed a prescriptive right to use the well on the premises of the defendant Augustus Hill, and while attempting to remove boards nailed upon the top of the curb, the defendant Maria Hill wrenched an axe out of her hands and assaulted her. The defendant Augustus Hill claimed title in fee to the well and the premises on which it was located, and had actual possession of the same and claimed a lawful right to defend such possession. The referee found in favor of the plaintiff for the sum of forty-five dollars damages, for the assault and battery, and judgment was entered on his report. The questions raised on the trial, so far as material, appear in the opinion. The defendant appealed from the judgment entered on the referee's report, to the general term of the supreme court.

L. Tremain, for the appellants.

S. A. Givans, for the respondent.

By the Court, MILLER, J. The trial of this cause involved the question whether the original plaintiff, Anna German, deceased, had a prescriptive right to use a certain well on the premises of the defendant Augustus Hill. The referee allowed the plaintiff to give in evidence a recovery previously had, in a justices' court, in favor of the plaintiff, against the defendant Augustus Hill, involving the title to the well. The complaint in that action admitted that the defendant was in possession of the well, and claimed to recover upon the ground that the plaintiff had title to the well, and a right to draw water from it for her family use. This title was disputed by the defendant; and upon the trial, the defendant, in various forms, and repeatedly, requested the justice to dismiss the cause, upon the ground that it appeared from the plaintiff's own showing that title to real property was in question, which was disputed, and for that reason the justice had no jurisdiction of the action. The defendant also

objected to the evidence of title which was introduced at different times, and the question was frequently presented to the justice upon the trial, and decided adversely to the defendant by him, he finally rendering a judgment in favor of the plaintiff. The plaintiff in that action, before the cause was finally submitted, undertook to obviate the difficulty by consenting that those portions of the evidence bearing upon the question of title should be stricken out. This was not done, however, and the testimony and proceedings before the justice, which are quite voluminous, show that the case involved a question of title to real estate, which was disputed The evidence introduced upon the trial of this action was offered for the purpose of establishing that the question involved had been decided in the suit before the justice, adversely to the defendant, and that the judgment there was conclusive, and the controversy here was *res adjudicata*. It was objected to by the defendant upon several grounds, and particularly upon the ground that the justice had no jurisdiction to determine the question of title involved in this action, and that it did not determine any question of actual possession of the well or premises that might then or subsequently exist. I think the referee erred in admitting the evidence introduced. The proceedings before the justice clearly showed that the title to land was involved, by the plaintiff's own showing, and that the title was disputed by the defendant. The justice was prohibited from taking cognizance of the action, and was bound to dismiss the case the moment it appeared that the title to the land was in question, and that such title was disputed by the defendant. (*Code*, §§ 54, 59.) The principle is too well settled to require any elaboration, and the authorities are numerous upon the question. (*Main* v. *Cooper*, 25 *N. Y. R.* 180. 6 *Wend.* 465. 15 *id.* 342. 19 *id.* 373. 6 *Hill*, 342. 20 *Wend.* 96 6 *Hill*, 537.)

I think that the judgment of the justice was void, as he had no jurisdiction. The moment it appeared from the plain-

tiff's evidence that the title to real property was in question, and such title was disputed by the defendant, he should have then dismissed the action, and his proceedings afterwards were without authority. They were as nugatory as if he had tried an action for assault and battery, false imprisonment, or any other action which the law prohibits him from taking cognizance of. In order to constitute a judgment, on a fact or title distinctly put in issue, an estoppel in another action, between the same parties and their privies, in reference to the same subject matter, it is essential that the tribunal passing upon the question should have jurisdiction. It is only when they act within the sphere assigned to them that their adjudications are binding upon the parties, in future controversies relating to the same matter. (2 *Phillips' Evidence*, 13, 14. 2 *Cowen & Hill's Notes*, 12.) The moment a tribunal of limited jurisdiction goes beyond its sphere of action, its proceedings are *coram non judice* and void. The question is one of jurisdiction, and no act can confer power when it does not originally exist, and its exercise is expressly prohibited. A judgment obtained under such circumstances was void, and would not stand upon review before any superior tribunal. Although unimportant, it was conceded on the argument that the judgment has since been reversed. We are referred to a manuscript report of the case of *Brandon* v. *Morss*, decided in the court of appeals, as an authority for the doctrine that where the defendant did not file an undertaking, the justice could rightfully proceed with the cause. It does not appear distinctly, in this case, that the question of title was presented by the pleadings, or that it appeared by the plaintiff's own showing and was disputed, and that a motion was then made to dismiss the cause upon that ground. The case is not in point, and is far different from one which presents strong and conclusive evidence and unmistakable ear-marks that the justice improperly, without jurisdiction and against the repeated objections of the defendant, tried the question of title.

Nor was the evidence competent upon the question of possession. The complaint in the action before the justice admitted possession in the defendant, and upon the trial of this action the plaintiff's counsel admitted such possession, and the referee so found.

For the error referred to, there must be a reversal of the judgment. And as the original plaintiff is deceased and the cause of action does not survive, and no new trial can be had, an examination of the other questions raised becomes unnecessary and unimportant; and the order should be, that the judgment entered on the report of the referee be reversed, without costs to either party.

Judgment accordingly.

[Albany General Term, March 7, 1864. *Peckham, Miller* and *Ingalls*, Justices.]

43 48
7L 17
10h 532
35h 210
75a 74
77a 136

Cowen *vs.* The Village of West Troy.

When a party relies upon erroneous decisions made upon a trial before a referee, it is not necessary to make and serve formal exceptions to the report of the referee. If it is claimed that the referee has erred in his legal conclusions, then the party must apprise his adversary of the ground of his objections, by serving exceptions, in the manner provided in the first clause of sec. 268 of the code of procedure.

An ordinance passed by a municipal corporation must be made to conform, strictly, to the provisions of the charter.

The charter of the village of West Troy required the trustees, whenever they should deem it necessary to make or repair any highway, street, &c. to give a notice of three weeks, in a newspaper, requiring the owners of lands to make the improvement, in such a manner, and with such materials, as the trustees should direct, within six weeks, under the supervision of the street commisioner, or that the same would be done by the trustees, and the expense charged upon the lot or lots, &c.; and in case of the neglect or refusal of such owner to make the improvement specified, within the time limited, the trustees were authorized to do the same, and assess the expenses upon the lots. On the 7th of December, 1855, the trustees passed

an ordinance requiring the owners of lots affected by it, within six weeks, to cause a street to be pitched and graded opposite their respective lots; and that in case of neglect or refusal, the street commissioners should cause the work to be done and the expenses to be assessed upon the lots. On the 1st of January, 1856—less than a month after the passage of the ordinance—the work to be performed under it was awarded to McG., and was subsequently done by him. The ordinance contained no provision prescribing the manner in which the work should be done, or what materials should be used; and there was no proof of publication of the three weeks' notice provided for by the charter, and no delay of six weeks from the first publication of the notice, to enable the owners to perform the work themselves.

Held that the proceedings under the ordinance were without authority and utterly void; and that as a necessary consequence no action would lie against the corporation, to recover for work and labor done under it.

Held, also, that the fact that the work was done under the direction of the street commissioner did not obviate the difficulty.

And that a subsequent ratification of the contract, whether before or after the work was done, would not make the contract obligatory upon the corporation.

When the contract under which work is done for a municipal corporation is void, because entered into in violation of its charter, the contractor can not recover for the work in any form; neither under the contract nor upon the *quantum meruit*.

A person contracting with a municipal corporation is bound to see that the provisions of its charter have been complied with; and if he proceeds without doing so, he must take the consequences of his temerity or want of care.

APPEAL from a judgment entered on the report of a referee in favor of the plaintiff. The action was brought to recover for work, labor and services alleged to have been rendered by one James McGrath for the defendants. It was admitted, on the trial, that the sum of $64 was due for work done. The balance, $224.18, the defendants claimed was for work performed in pitching and grading Stafford street in the village of West Troy, under an ordinance passed by the trustees on the 5th of December, 1855, which, it was alleged, was void on its face, not being in conformity with the provisions of section 51 of the charter of said village. The plaintiff, on the trial, introduced evidence to show the passage of the ordinance, the proceedings under it, including an

award of the job to McGrath, and his working under it. Various objections were made to the introduction of this evidence, upon the ground that the ordinance and proceedings were void, the ordinance not having been passed and the proceedings conducted according to the provisions of the charter. The points made will appear in the opinion of the court. The claim had, before suit brought, been assigned to the plaintiff. The referee reported in favor of the plaintiff, a judgment was entered upon the referee's report, and the defendants appealed to the general term of the supreme court.

A. Kemey, for the appellants.

P. W. Bishop, for the respondent.

By the Court, MILLER, J. A preliminary objection is raised in this cause, as to the right to review the decision of the referee, upon the ground that no exceptions have been taken to the referee's report. It is insisted, that no exceptions having been taken, it is an admission that none will lie; and in view of the admissions made as to the correctness of the findings of facts and conclusions of law of the referee, the case can not be reviewed.

It is no doubt essential, in order to review, at general term, any finding or final decision of a referee upon a question of law or fact, that exceptions should be served to the referee's report, within ten days after notice of the judgment. (*Code*, § 268.) And when the case does not contain exceptions taken during the trial or after the judgment, it can not be reviewed by the court, and the appeal will be dismissed. (*Hunt* v. *Bloomer*, 3 *Ker.* 341.) But when the party relies upon erroneous decisions made upon the trial, it is not necessary to make and serve formal exceptions to the report of the referee. If he insists that the referee has erred in his legal conclusions, then he must apprise the party of the ground of his objections, by serving exceptions in the manner provided

in the first clause of § 268 of the code. Several objections were taken, on the trial before the referee, to the admission of testimony and otherwise, and exceptions made to his rulings in disposing of these objections. I think there can be no legal objection to reversing the decisions of the referee in the particulars named, and if it be found that he has erred therein in any way, to setting aside his report for that reason.

It is claimed by the defendant that the work performed in pitching and grading Stafford street in the village of West Troy, for which a recovery was had, was done under an ordinance which was not in conformity with the provisions of sec. 51 of the charter of the village. (*Laws of* 1850, *p.* 445.)

By the section of the charter above cited, the trustees of the village, when they deem it necessary to make or repair any highway, street, &c. are required to give public notice in one of the newspapers printed in said village, once in each week for three weeks successively, requiring the owners of lands to do the same in *such a manner and with such materials as the board of trustees shall direct*, within six weeks from the first publication of said notice, under the supervision of the street commissioner, or that the same will be done by said trustees, and the expense thereof charged upon the lot or lots respectively and be a tax against the owner. And if the owners neglect or refuse to make the improvement specified and required, within the time limited therefor, the trustees are authorized to do the same, and to assess the expenses upon the lots respectively in front of or adjoining said improvement.

The ordinance under which it is claimed the work was done, was passed on the 7th of December, 1855. It required the owners of the lots affected by it, within six weeks after its publication, to cause the street to be pitched and graded opposite their respective lots, and that the sidewalks and gutters should be constructed so as to conform to a profile of said street adopted by a former board of trustees, and

that the work should be done under the supervision of the street commissioner.

It further provided that in case the owners should refuse or neglect to comply with its requisitions within the time specified, the street commissioner should cause the work to be done, and the expenses incurred thereby should be assessed upon the lots, according to law. Upon the first of January after the passage of the ordinance, less than one month, the work to be performed under it was awarded to the assignor of the plaintiff, and under this award it appears to have been done.

It must be observed that the ordinance contained no provision prescribing the manner in which the work should be done, or what materials should be used in performing the job. Besides this, there was no proof of publication of the notice of three weeks, provided for by the charter, and no delay of six weeks from the first publication of the notice, to enable the owners to perform the work themselves, as they have a right to do, within that period of time. In less than one month after its passage, without pursuing these plain provisions of the statute, the work was given out, and they were never complied with. It is very evident that the proceedings under this ordinance were entirely without authority, and utterly void. As a necessary sequence no action can lie to recover for work done under it. An ordinance passed by a municipal corporation must be made to conform strictly to the provisions of the charter. (*Thompson* v. *Schermerhorn*, 9 *Barb.* 152. 2 *Seld.* 92.) And when the contract under which the work is done is void, because entered into in violation of the charter, the contractor can not recover for the work in any form, neither under the contract nor upon the *quantum meruit*. (*Brady* v. *The Mayor of New York*, 16 *How.* 432. 20 *N. Y. Rep.* 312. *Bonesteel* v. *The Mayor of New York*, 20 *How.* 240. *McSpedon et al.* v. *The Mayor of New York*, *Id.* 395.)

Those who deal with a corporation, the mode of whose

action is limited, must take notice of the restriction in its charter, and see to it that the contracts on which they rely are entered into in the manner authorized by the charter. (16 *How.* 432.) Within the rules laid down in the authorities above cited, I am of the opinion that the plaintiff was not entitled to recover for the work done under the ordinance. The fact that the work was done under the direction of the street commissioner by no means obviates the difficulty. This was in accordance with the express provision of the ordinance, and it does not aid the plaintiff's case that a void and illegal ordinance was carried into effect under a competent officer. It is said that the defendants ratified the contract by auditing the bill, and by the payment of part of the amount. Even a subsequent ratification of the contract, whether before or after the work was done, does not make the contract obligatory upon the corporation. (16 *How.* 432. *Hodges* v. *The City of Buffalo*, 2 *Denio*, 113.) It is also urged that the question of validity of the ordinance is not in the case, and that the contractor acted under the direction of the street commissioner, and only performed such services as, by section 16 of the charter of the village, the commissioner was directed to have performed. The street commissioner is only authorized to act under the direction of the trustees in superintending and in carrying into execution the ordinances and resolutions of the board of trustees. And much of the evidence introduced by the plaintiff was designed, apparently, to establish that the work was done under the ordinance, and that such was its legal effect. I think, therefore, that it can not fairly be claimed that the work was done independently of the ordinance, and that its validity is not in question. The plaintiff also relies upon the finding of the referee that the work and labor were performed for and at the request of the defendants, and that no exception was taken to this finding. If no exceptions had been taken to the rulings of the referee upon the questions arising as to the admissibility and the striking out of evidence, the point,

perhaps, would be well taken. As the case stands, however, with repeated decisions of the referee in favor of evidence which showed that the ordinance was invalid, and exceptions taken to his decisions, I think the objection is not available. In the case before us the equities are certainly with the plaintiff, and it is very apparent that all the parties acted under the supposition and belief that the contract was a valid and binding one, and that the trustees had power to make it; but under the rules of law applicable to such cases, I do not see, that the plaintiff has any legal remedy. The contractor is bound to see that the provisions of the charter have been complied with, and if he proceeds without doing so, he must take the hazards of his temerity or want of care.

The referee having erred in allowing $224.18, with interest from April 30, 1858, for the labor and services done in pitching and grading Stafford street, the judgment should be reversed, unless the plaintiff deduct that amount. If he deduct, then judgment should be affirmed as to the residue, without costs of appeal to either party.

Judgment accordingly.

[Albany General Term, March 7, 1864. *Peckham*, *Miller* and *Ingalls*, Justices.]

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43 54
46 662
47n 391
36a 664
42k 445

Luke and others *vs.* The City of Brooklyn.

For the purpose of ascertaining whether particular property is situated within the city of Brooklyn, the line of low water, as the water flows in the East river after the land is reclaimed from the river or by the erection of wharves and piers and the filling in from the shore for that purpose, is to be deemed the dividing line between the cities of New York and Brooklyn.

The jurisdiction of the city of Brooklyn must, from necessity, follow the shore as it advances into the river or bay, whether the accretion proceeds from alluvion or artificial deposits and erections.

Piers and buildings which are taxed by the city of Brooklyn, must, in an

action against the city, to recover the value thereof on their being destroyed in consequence of a mob or riot, be regarded as within the corporate limits and boundaries of Brooklyn.

The act of April 13, 1855, "to provide for compensating parties whose property may be destroyed in consequence of mobs or riots," was a valid and constitutional act.

The duty and obligation of the state to provide for the safety of property against the destructive violence of mobs of lawless and riotous men, is too plain for a question; and the suplemental obligation imposed upon cities and counties to provide compensation for the injury or destruction of property which they could not, or would not, prevent, is but another application of the same principle of public duty. *Per* BROWN, J.

THE plaintiffs obtained a verdict in this action, under the act of the 13th of April, 1855,(*a*) "to provide for compensating parties whose property may be destroyed in consequence of mobs or riots." The property destroyed was a grain elevator of great value, situate at the Atlantic dock, upon the Brooklyn side of New York bay, on the night of the 15th of July, 1863, during the prevalence of the New York riots. Judgment was entered upon the verdict, and the defendants appealed.

H. C. Murphy and *J. W. Gilbert*, for the plaintiffs.

John G. Schumaker, for the defendant.

By the Court, BROWN, J. The question of the carelessness and negligence of the plaintiffs, and their reasonable diligence to avert the injury, arose upon the evidence, in the process of the trial. It was distinctly presented by the judge to the jury, without exception, and as they found it in favor of the plaintiffs, the verdict upon the point can not be disturbed. So, also, a question was raised in regard to the *locus in quo;* the defendant insisting that the building destroyed was not within the city of Brooklyn. It was situated on what is called the south middle pier of the Atlantic dock, about the center of the basin, and on the end of the

(*a*) Laws of 1855, p. 899.

pier extending from the main dock on the south side of the basin. The pier was some 900 feet, commencing on the south side and running north about 100 feet from the bulkhead. The elevator building was erected below low water mark, in water originally 5 or 10 feet deep, but afterwards made 20 or 25 feet deep by dredging. Low water mark is claimed by the defendant to be the dividing line between the cities of New York and Brooklyn. But we think it is low water mark for all the purposes of this action, as the water flows after the land is reclaimed from the river or bay by the erection of wharves and piers, and the filling in from the shore for that purpose. The jurisdiction of the city of Brooklyn must from necessity follow the shore as it advances into the river or bay, whether the accretion proceeds from alluvion or artificial deposits and erections. This is asserted in *Udall* v. *Brooklyn*, (19 *John.* 175.) So, also, the act of the 17th of April, 1854, to consolidate the cities of Brooklyn and Williamsburgh and the town of Bushwick, &c. bounds the consolidated city "west by the town of New Utrecht and the bay of New York," and "north by the East river." The piers and buildings are taxed by the city of Brooklyn, and must therefore be regarded as within its corporate limits and boundaries.

The first section of the act under which this action is brought declares, that "when any building or other real or personal property shall be destroyed or injured in consequence of any mob or riot, the city or county in which such property was situated shall be liable to an action by and in behalf of the party whose property was thus destroyed or injured, for the damages sustained by reason thereof." This section recognizes the duty and obligation of the state to secure and protect the property of the citizen from injury and destruction by lawless and riotous bodies of men, and in the event of its failure or inability to furnish such security and protection, from any causes other than the carelessness and negligence of the owners of such property, it imposes upon the

political community — the city or county — when such property shall be injured or destroyed, the further obligation of paying the full value thereof, or the extent of such injury, by moneys to be assessed and collected upon the taxable property of such city or county, in the same manner as other public moneys are assessed and collected.

The principal question raised upon the appeal in this action is upon the force and validity of the act referred to, and the constitutional power of the legislature to pass the law. If any rule of legislative authority may be regarded as settled and established in the courts of this state, it is that which declares that the power of the legislature is supreme in all respects, and unlimited in all matters pertaining to legitimate legislation, except when it is limited and restrained by the fundamental law. After the numerous decisions by the courts, asserting the existence of this authority, to the extent stated, we may safely decline the attempt to re-examine and re-state it; for it is apparent that the subject is in a manner exhausted, and his must be a fertile mind, indeed, who can add to the force of the arguments already rendered, or shed any additional light upon the subject. (*Providence Bank* v. *Billings*, 4 *Peters*, 561. *McCullough* v. *Maryland*, 4 *Wheat.* 428. *The People* v. *Mayor of Brooklyn*, 4 *Comst.* 419. *Brewster* v. *City of Syracuse*, 19 *New York Rep.* 116. *The Town of Guilford* v. *Supervisors of Chenango*, 3 *Kern.* 143.) In this last case we find the authority asserted in these words: "Taxation is indisputably a legislative power. The constitution of this state will be searched in vain for any clause which contains any restriction or limitation on the taxing power of the legislature. Provisions there are, regulating the manner in which bills appropriating the public moneys for local or private purposes, or bills imposing taxes, shall be passed." After referring to these provisions by their article and section, the opinion proceeds: "These, it will be seen, are not limitations of the absolute power of the legislature over the public moneys, or of the

like power in the imposition of taxes, but rules prescribing the manner of its exercise. Whenever these formalities are observed, the legislature has the right to appropriate the public moneys for local and private purposes, and to impose a tax upon the property of the whole or any part of the state, or any particular and specified kind of property." The duty and obligation of the state to provide for the safety of property against the destructive violence of mobs of lawless and riotous men, is too plain for question; and the supplemental obligation imposed upon cities and counties to provide compensation for the injury or destruction of property which they could not or would not prevent, is but another application of the same principle of public duty.

The judgment should be affirmed.

[Orange General Term, September 12, 1864. *Brown, Lott, Scrugham* and *J. F. Barnard*, Justices.]

43 58
66 345
10h 234
53a 243

Sally Ann Mackey *vs.* William Mackey.

William Mackey *vs.* Emory F. Warren and Lorenzo Morris.

An assignment made by a party to his attorney, of a verdict and the judgment to be entered upon it, to pay the attorney for his services and disbursements in the action, is upon a good and valid consideration.

After a verdict for the plaintiff, in an action for a personal tort, but before judgment, the plaintiff assigned the verdict, together with the judgment to be entered upon it, to his attorney, in payment for his services and disbursements: *Held*, that the assignment had the effect to transfer the verdict, and the judgment when entered, to the assignee; and that the latter had not only a prior but a superior equity to that of the defendant claiming a right to set off a judgment previously recovered against the assignor.

The equity to have one judgment set off against another can not arise until judgment is actually recovered in the second action. An assignment made previous to that event, transferring a legal, or even an equitable title, to

the demand, will have the effect of preventing the right of set-off from accruing.

The case of *Brooks* v. *Hanford* (15 *Abb. Pr. Rep.* 342) overruled.

THE plaintiff in the first of the above causes recovered a judgment for costs against William Mackey, who was plaintiff in the other suit. She sold and assigned her judgment for costs to the defendants in the second suit, on the first of March, 1860. The plaintiff in the second suit recovered a verdict in that suit for fifty dollars damages, on the fourteenth day of November, 1860, for false imprisonment; and on that day he executed and delivered a formal assignment to his attorney of the verdict recovered, together with the judgment to be entered upon it. Judgment was stayed, until exceptions taken by the defendants were heard and decided at general term. That court decided the exceptions against the defendants, and directed judgment accordingly. When judgment was entered, the defendants in the second suit moved to set off their judgment in the first suit against it, which motion was granted. From this order an appeal was taken to this court.

Henry C. Tucker, for the appellant.

Warren & Morris, in person.

By the Court, DANIELS, J. The assignment, the validity of which is in controversy upon this motion, was made and delivered by the party to his attorney immediately after the recovery of the verdict. It was made to pay, or apply upon, a debt owing to the attorney for his services and disbursements, which in law constituted a valid consideration. (*Van Pelt* v. *Boyer*, 8 *How.* 319. *Ward* v. *Syme*, 9 *id.* 16 *Roberts* v. *Carter*, 17 *id.* 341.) And, in terms, it transferred the verdict and the judgment to be entered upon it.

If this assignment was valid, the motion to set off the judgments can not prevail; because the right to set-off does

not arise until the judgment to be affected by it is recovered. (*Graves* v. *Woodbury*, 4 *Hill*, 559, *and cases before cited.*) And an assignment previously made, transferring a legal, or even an equitable title to the demand, will have the effect of preventing the right of set-off from accruing. (*Myers* v. *Davis*, 22 *N. Y. Rep.* 489, 493, 494.)

When the present assignment was made, there was neither a judgment nor the right to enter one; for, upon the defendants' motion, judgment was suspended, until certain exceptions they had taken were first heard, and decided by the general term.

This brings the present controversy to the question, whether the assignment had the effect to transfer the verdict, and the judgment when entered, to the attorney. That depends upon the assignability of a demand for a personal tort, after verdict.

The primitive rule of the common law did not permit a demand arising out of a tort to be assigned. Claims of that nature did not survive the party entitled to assert them. A change was afterwards made in this rule, by the enactment of certain statutes allowing the personal representatives to maintain trespass *de bonis asportatis*, where the right of action accrued in the lifetime of the testator or intestate. By an equitable construction of these statutes, the right of the personal representatives to maintain the action was afterwards extended so as to include all actions for damages occasioned by injuries to the property, as distinguished from injuries to the person of the deceased. The same principle was embodied in the statutes of this state. And as a consequence resulting from the enactment of these statutes, and the liberal construction to which the courts subjected them, the doctrine was finally established that all demands arising in tort, which survived to the personal representatives, were assignable. The right to assign was held to be coextensive with the right of the personal representative to redress for injuries to the property of the deceased. (*The People ex rel. Stanton* v.

Tioga Com. Pleas, 19 *Wend.* 73. *Zabriskie* v. *Smith*, 3 *Kernan*, 332, 336. 3 *R. S. 5th ed.* 202, §§ 4, 5.) The same principle was embodied in the code in 1849. (*Laws of* 1849, *p.* 639, § 121.) This statute provided, that where the cause of action survives, the action may be continued by or against the representative, "or successor in interest," of the deceased party. The terms "successor in interest," which are used in this provision of the statute, are significant, for they assume the assignability of all demands which survive by law. It is by assignment that such a relation is most commonly created. This principle was still further extended in 1857. An amendment was then adopted by which actions for mere personal wrongs were declared to survive, after verdict. (*Laws of* 1857, *vol.* 2, 552, 553, § 121.) By that amendment it is provided, that after the recovery of a verdict, in actions for personal injuries, the action may proceed after the death of the party, in the same manner as where the cause of action previously survived by law; that is, as declared by the law of 1849, by or against the personal representative, or successor in interest. The demand is, under this statute, invested with the attributes of property, after verdict, capable of a legal existence in and of itself.

But without giving too much prominence to the words "successor in interest," the assignability of the demand, after verdict, is sustained by extending to this amendment the same rule of construction that prevailed under the previous statutes. The reason for applying it to cases within the intent of the last amendment is precisely the same as that which first originated the rule itself.

The only direct authority opposed to this conclusion is the case of *Brooks* v. *Hanford*, (15 *Abb. Pr. Rep.* 342.) That case holds that a demand for damages, on account of a mere personal tort, can not be assigned until a judgment is actually recovered. It is a general term decision, and for the purpose of securing uniformity in the administration of the law, should be followed, unless very manifestly wrong, or clearly in con-

flict with the settled course of previous adjudications. But this question was not considered, by the court pronouncing that decision, in view of the changes necessarily produced by the recent amendments to the statute. And the conclusion arrived at is also strikingly in conflict with the doctrine maintained in the earlier cases upon the same subject.

In the case of *The People* v. *Tioga Com. Pleas*, (19 *Wend.* 73,) the instrument relied upon as producing a transfer of the cause of action was in the nature of a power of attorney. It empowered the party to whom it was given, to prosecute an action for seduction, for the benefit of the person receiving it. While the court held that it could not have the effect of transferring the cause of action, it also held that an equitable right to the money recovered was created by it. Cowen, J. says: "Suppose Stanton had got the money, could Thomas have recovered it of him? I should think, not a cent of it." In *Stanton* v. *Thomas*, (24 *Wend.* 70,) the same instrument again came before the court for consideration. That was an action by the party receiving the power of attorney, against the nominal plaintiff, who had afterwards collected the money recovered by the judgment. The action was assumpsit for money had and received. Nelson, J. delivering the opinion of the court, in reference to the effect of the power of attorney upon the right of action, remarks: "Upon fair construction, it is a power coupled with an interest, and carries by implication the beneficial right of the cause of action, and was so intended by the parties. The money belongs to the assignee, in equity and conscience, and is wrongfully withheld." And again: "It belongs to the plaintiff, has been received in fraud of his rights, and it is held against duty and conscience." Under these authorities the assignment in question, of the verdict and the judgment when entered, certainly conferred upon the assignee an equitable right to the money recovered, superior to that which would have otherwise attached in favor of the moving party, because it was prior in point of time; for the equity, to have one judgment set

off against the other, could not arise until judgment was actually recovered. The assignee recovered the verdict as the attorney of the assignor, and through his subsequent exertions and necessary disbursements secured a judgment upon it. He has not only a prior but a superior equity to that of the party claiming the benefit of a set-off. *Bradley* v. *Root*, 5 *Paige*, 640. *Stanton* v. *Tioga C. P. supra.* 22 *N. Y. Rep.* 493.) Precisely the same question was presented to this court at general term in the sixth district, where a verdict recovered in an action of slander was assigned, before judgment, by the plaintiff, to his attorney. The assignment was substantially the same as the one now in question, and was made after the recovery of the judgment by the defendant, which he moved to set off. But the motion was denied, the court holding that even though the verdict might not be assignable, yet the assignment conferred an equitable right to the money upon the attorney, superior to the right of set-off urged by the defendant. (*Nash* v. *Hamilton*, 3 *Abb. Pr. R.* 35.) It follows that the case of *Brooks* v. *Hanford* must be overruled, and that the judgment assigned to the defendant can not be set off against that recovered upon the verdict assigned by the plaintiff to his attorney. And it is therefore unnecessary to examine the question whether the set-off would be allowed when its effect would be to defeat the attorney's lien for services and disbursements, in a case where the client is insolvent. The order appealed from should be reversed, and the motion denied, without costs.

[Erie General Term, November 21, 1864. *Daniels, Grover* and *Marvin*, Justices.]

43 64
42h 39
33a 383
92a 302

HANNAH T. WHITE and others *vs.* HENRY W. HICKS, surviving executor &c. and others.

H. gave to his executors the sum of $100,000, in trust to pay over the income to his daughter, R., during her life, and in case she should have no children or grandchildren living at the time of her death, then in trust to pay over one half of such sum, viz. $50,000, to such person or persons, whether her husband or otherwise, as she might by last will and testament appoint. R. made a will by which she gave her husband $50,000, in general terms, and without any reference to the power of appointment given her by the will of her father. *Held* that the will was a valid execution of the power.

Held, also, that evidence as to the circumstances or condition of the property or fund in the hands of H.'s executors; to show that R.'s own savings or property was not sufficient to answer the special legacies bequeathed by her will; and of other extrinsic facts, as distinguished from what she said, at or about the time of executing her will, was properly received.

ELIZA H. HICKS RIEBEN, who was the daughter of Samuel Hicks, deceased, died in the year 1855, leaving her husband surviving, but no descendants. During her last illness, and shortly before her death, she made a will, which was duly admitted to probate in 1857. This instrument was drawn by the attending physician, Dr. Cheeseman. By its provisions she gave to her husband, Pierre Rieben, $50,000; to Hannah T. White, $20,000; to Samuel Hicks Seaman, $5000; to Maria W. Corlies, $1000; to Fanny Haff, $1000; to Luther Terry, $1000. The residuary clause was in the following terms: "The remainder to be equally divided between my cousins Elizabeth White, Sarah Hicks White and Cornelia White. All my clothing, jewelry, books, papers and personal property contained in the Metropolitan Hotel, and No. 10 West Fourteenth street, the bureaus, boxes and trunks to be given unopened to my cousins, Elizabeth White and Sarah Hicks White, for their use and control; the paintings at No. 10 West Fourteenth street, I give to my brother Henry W. Hicks; the one at the Metropolitan Hotel, by J. Terry, to be given to any public institution he may choose to name." The will further provided that, in

case of the decease of her husband, the $50,000 given to him should go in various sums to John Rieben, Caroline Hicks Seaman, John Hicks, John W. Haydock, Mrs. Chapman and Elizabeth White. If nothing could be heard of her husband, the legacy of $50,000 was to be held in trust for his benefit for ten years by Dr. Cheeseman, Edward H. White and Henry W. Hicks. Pierre Rieben, the husband, was living at the decease of his wife, and is now a lunatic in charge of a committee in Switzerland.

By the will of Samuel Hicks, the father of Mrs. Rieben, proved in 1837, she was entitled to the income of the sum of $100,000, given in trust to the executors of Samuel Hicks, viz. Henry W. Hicks, one of the above named defendants, and John H. Hicks, now deceased; also to the use for life of the premises No. 245 Broadway, and to certain household furniture absolutely. That will also contained the following power of appointment as to the $100,000 in trust to the executors. "But if she has no children or grandchildren living at the time of her death, then in trust to pay over one half thereof, to wit, $50,000, to such person or persons, whether her husband if she be married, or otherwise, as she may by last will and testament appoint; but the other half of said fund, it is my will, shall become part of, and go with the residue of my estate." The residue was given equally to her brothers, John H. Hicks and Henry W. Hicks. This disposition was not accompanied by any express limitation over, in default of an appointment. The daughter was an invalid, before her father's death, and she so continued ever afterwards. Subsequently to her father's death she resided in France, for many years. She married Pierre Rieben December 15, 1847. Her net income was about $12,000 per annum. Besides the personal chattels mentioned in her will, Mrs. Rieben owned certain moneys and investments in her own right, being the accumulations of her income, and amounting to $53,950. The general legacies in her will amounted to $82,000.

The present action was instituted by the legatees under her will, against Henry W. Hicks as surviving executor of Samuel Hicks, deceased, and the executors of John H. Hicks, deceased, to recover the $50,000 over which Mrs. Rieben had a power of appointment, under her father's will, on the ground that her own will effected a good and valid exercise of that power.

It appeared that Mrs. Riebien's brothers never set apart her $100,000, but that having continued the mercantile business in which they were partners with their father, they absorbed in its operations the whole of her father's estate. The mercantile firm also collected the rents of the house in Broadway. The firm supplied her with funds as required, upon her order, or by remittance on her request. They kept accounts accordingly; and her brother, Henry W. Hicks, from time to time, rendered her accounts, and advised her as to the amount of her estate. He made some investments out of her income, on bonds and mortgages, to the amount of $16,500, but he retained the securities in his personal custody. Mrs. Rieben "never saw any accounts which were kept concerning her father's estate or her own, or had any knowledge concerning such accounts or skill in or acquaintance with accounts." Henry W. Hicks, who is her surviving brother, and the only surviving executor of her father's will, was examined on the trial, as a witness for himself and his co-defendants. His testimony showed that all her money, as well that which was technically her own, as that over which she had the power, remained a common fund in the hands of the mercantile firm; and that whilst all her dealings were nominally with the firm, her brothers, and the survivor of them, managed the whole fund as they or he saw fit. She at all times acquiesced in their action, without inspection or scrutiny.

Parol evidence was adduced, on the trial, to bear upon the question of intention to execute the power, by Mrs. Rieben; as to her bodily condition at the execution of her will; and of extrinsic circumstances relating to herself or her estate. The evidence was objected to, but admitted, by the judge.

And it was agreed that it should be considered as duly excepted to, "so that every part of the same which was not admissible might be stricken out and wholly disregarded."

A judgment was rendered, at a special term, declaring that Mrs. Rieben had duly executed in favor of the plaintiffs a general testamentary power to dispose of $50,000, conferred upon her by the will of her father. From that judgment the residuary legatees appealed.

Joseph J. Marrin and *A. W. Bradford*, for the appellant. I. A power is a mere authority by the owner of property, real or personal, to do some act in respect thereto which such owner might himself lawfully perform. If a valid appointment be made under such authority, the donee takes title under the grantor of the power. The exercise of the power by an appointment, whether by deed or will, operates not as a gift of the appointor's own property, but as a gift of the property of the grantor of the power.

II. There must, therefore, be a necessary and manifest distinction between the mode of parting with the grantor's own property, and the mode of disposing of the property of another, under a power. (1.) The former will pass by deed or will purporting simply to convey or devise the owner's property. (2.) The latter will not pass by such an instrument, because it is not the property of the grantee of the power.

III. It is a well settled rule at common law, that a mere general devise or bequest, however unlimited in terms, will not comprehend the subject of the power, but will be attributed or applied to the testator's own estate, and not to the estate of the grantor of the power. There being a distinction between a person's own property and the property of another disposable by a power, "if that distinction exists, it is impossible that the power can be executed by the very words by which property is given." (*Bradly* v. *Westcott*, 13 *Ves.* 444.)

IV. A will disposing of real estate operated at common

law, and also under the statutes 32, 34 and 35 Hen. 8, in the nature of a conveyance, and consequently extended only to hereditaments belonging to the testator when he made the devise. (1 *Jarman*, 43.) (1.) A will of real estate was, therefore, in the nature of a conveyance or appointment of a particular estate. (2.) And if at the time of the execution of the will the testator had no real estate, but had a power of appointment over the real estate of another, a general devise was held an appointment, because, to give any effect to the instrument, the intent to execute the power must be inferred. (3.) But if the testator had any real estate of his own, the intent to execute the power could not be inferred, there being *something* upon which the will could take effect, as the property of the testator. (*Sir Edward Clere's case*, 6 *Coke*, 176.) "It is well settled, that a general disposition of all the lands of a party, or all his lands in a particular county or place, will not pass lands which the party has merely a power to dispose of, provided, at least, he has other lands to answer to the words." (2 *Chance on Powers*, 84, 92, 98. *Sugden on Powers*, 385.) In *Lewis* v. *Llewellyn*, (*Turner & Russ.* 104,) a testator having a power of appointment over certain freehold and copyhold estates, and being seised of other freehold estates, devised all his freehold and copyhold estates without reference to the power. It was held that the power was duly executed as to the copyhold, but not as to the freehold, there being a subject for that branch of the devise. In *Napier* v. *Napier*, (1 *Simons*, 28,) the testator made a general devise of all his lands in nine parishes; in five of them he had no lands of his own, but there were lands over which he had a power of appointment; in the others he had lands in fee, and there were also lands over which he had a power. It was held that the estates under the power passed only in those parishes where the testator had no lands of his own. In *Lovell* v. *Knight*, (3 *Sim.* 273,) the words of the will were: "The whole of my property, both real and personal, and whatever I may

possess at the time of my decease." The vice-chancellor said: "I apprehend it to be perfectly settled, that whenever a will is couched in such terms that, on the face of it, it appears to express an intention to pass the general property which belongs to the party making the will, such a will will not be deemed an execution of the power with regard to any specific property." (2 *Bing.* 497. 10 *Moore*, 113. 5 *Barn. & Cress.* 720. 8 *Dowl. & Ryl.* 514. 6 *Bing.* 475.) In *Rooke* v. *Nowell*, (4 *Bligh*, 151,) the testator owned a moiety of certain land in the county of S. in fee, and the other moiety he held as tenant for life, with power of appointment, and it was held that the part under the power did not pass by a devise of all his freehold estate in the county of S. The will was sustained as a valid execution, in the common pleas; but judgment was reversed in the house of lords, where Lord Tenterden said that it was the better course to abide by general rules and principles, and not to be led aside by subtle distinctions and considerations of hardship in particular cases; otherwise one uncertainty would arise after another, and the end would be inextricable confusion.

V. The statute having changed the rule as to a general devise of real estate, the exceptions to the rule of refusing to look outside of the will, in case of a general devise, would no longer exist. (1.) As the effect of our statute of wills was to alter the common law rule, that all devises are in their nature specific, and to give effect to a general devise over all the real estate owned by a testator at the time of his decease, the rule in respect to a general devise of real estate would be assimilated to the rule in respect to a general bequest of personal estate; for though the testator have no real estate at the time of making the will, he may acquire some, and words of general devise, therefore, have meaning, without resorting to property embraced under a power. (*Sugd. on Pow.* 423.) (2.) The statute as to powers has provided, perhaps for this reason, that "lands embraced in a power to devise shall pass by a will purporting to convey all the real property of the

testator, unless the intent that the will shall not operate as an execution of the power shall appear expressly, or by necessary implication." (1 *R. S.* 737, § 126.) (3.) The statute, however, does not relate to personal estate, which is still left under the dominion of the rules of the common law.

VI. In respect to personalty, the rule has been always strict and undeviating, that you can not look beyond the face of the will for an intent to execute the power. (1.) If the testator have personal property of his own, general bequests must be held to refer to his own property. (2.) If he have no property of his own at the date of the will, yet as future gains will pass, it can not be inferred that he did not intend what he might acquire in future. So the gift of the residue covers all lapses. (3.) In a will of personal estate, a testator is presumed to speak as of the time of his death, and not in reference to any prior or subsequent period. (*Van Vechten* v. *Van Vechten*, 8 *Paige*, 104.) (4.) No ambiguity, therefore, can be raised by the testator making general legacies, which he has not sufficient assets to meet at the time of making the will, and there being no ambiguity, parol evidence can not be given to show an intention not to be found within the will. (*Mann* v. *Mann*, 1 *John. Ch.* 231. *Bunner* v. *Storm*, 1 *Sand. C. R.* 357.) (5.) If parol evidence can be given, the object of the statute requiring wills to be in writing must be defeated. When there is no ambiguity on its face, and none raised on its application, there is nothing to explain by extrinsic proof. (6.) There is no case authorizing the reception, as evidence, of what the testator *said* before or after, or at the time of execution. (7.) The intention to execute the power must be clear. (2 *Chance on Pow.* 92.) "If it be doubtful under all the circumstances, that doubt will prevent it from being deemed an execution of the power." (*Blagge* v. *Miles*, 1 *Story's C. R.* 426.) Slight circumstances of conformity or difference will not amount to a sufficiently clear indication of intention. (*Sugden*, 417, 423. *Bennett* v. *Aburrow*, 8 *Ves.* 609.) As where the husband had power

to devise after the death of his wife, and he made a general disposition to take effect after his wife's death, held no evidence of intention to execute the power. "The instrument being executed in the manner required by the power, goes for nothing." (*Sugden*, 417, 423. 2 *Chance on Pow.* 92.) The mere gift, as an ordinary legacy, of the precise sum which the testator has power to appoint, is not deemed a reference to the power. (*Jones* v. *Tucker*, 2 *Meriv.* 533.) The intent must be so clear that no other reasonable intent can be imputed to the will. (4 *Kent's Com.* 375.) The *terms* must "*demonstrate*" that the testator "had the power in his contemplation," and "intended by his will to execute it." (*Lord Chief Justice Best in Nowell* v. *Roake*, 2 *Bing.* 497, 504.) (8.) Before the act authorizing married women to devise and bequeath real and personal estate, the mere fact of making a will might, perhaps, be some evidence of an intent to execute a power; and yet this circumstance was never held sufficient to disturb the rule. (9.) There are instances where the intent has been inferred, in cases of general devise, but they are characterized by the fact that the testatrix had a right of property of her own in the subject of the power, to which words of general devise could be applied. Thus in *Bradish* v. *Gibbs*, (3 *John. Ch.* 523,) the subject of the power was real estate, belonging to the wife, and settled on her by ante-nuptial contract, with a power of appointment. She made a general will, leaving all her property to her husband, and it was held a due execution of the power. In *Blagge* v. *Mills*, (1 *Story's C. R.* 426,) there was no doubt as to the intent. This case related to real estate, was a general devise, and the testatrix had no land to answer it except that over which she had a power. (*See also Hales* v. *Margerum*, 3 *Ves.* 299.)

VII. Evidence to show that the testator's own estate was insufficient for the purposes of the will can not be received. In *Andrews* v. *Emmot*, (2 *Bro. Ch. Cas.* 297,) the testator having power over £3000, originally the property of his wife,

gave by his will several legacies, and then, after the death of his wife, the residue to the defendant. It was held that the power was not executed, the same not having been referred to nor any thing appearing to indicate an intention to execute it. Evidence to show the testator's own estate was insufficient for the purposes of his will, without the £3000, rejected. In *Hales* v. *Margerum*, (3 *Ves.* 301,) the master of the rolls said: "*Andrews* v. *Emmot* is a leading case, and has perfectly and clearly established, that to execute a power there must be a direct reference to it, or a clear reference to the subject, or something upon the face of the will, or independent of it, some circumstance which shows the testator could not have made that disposition without having intended to comprehend the subject of the power." In *Nannock* v. *Horton*, (7 *Ves.* 391,) a power of appointment of personal property was held not to be executed by a will having no reference to the power or the subject of it. The court refused to inquire into the circumstances of the property, to determine if it were alluded to in the will. The chancellor said: "The case of *Andrews* v. *Emmot*, and the others of that class, are clear, distinct and positive, and express to the point that you are not to inquire into the circumstances of the testator's property at the date of the will, to determine whether he was exercising the power or not." In *Webb* v. *Honner*, (1 *J. & Walk.* 532,) a testator having power to appoint a sum in the funds, made a general will bequeathing all his personal estate, "consisting of money invested in any of the public funds, household furniture," &c. and it was decided not to be an execution of the power, the court saying, "the circumstance of his having no other funded property is not to be adverted to, on the question whether he was or was not executing the power." In *Jones* v. *Tucker*, (2 *Meriv.* 533,) there was a devise of real estate, with direction to sell, and out of the produce to pay £100 to such person as E. S. should appoint. E. S. by will, without reference to the power, gave £100 and her household furniture to the plain-

tiff. It was charged by the bill, and not *denied*, that the testatrix had no personal property at the time of her death, except furniture of small value, and an inquiry was asked as to the state of her property at *the time of making her will*, with the view of showing that she must have intended the gift of £100 as an execution of the power; but the inquiry was *refused*, and the bill dismissed. It was held that there could be "no inquiry as to the *quantum* of personal property, to determine whether a gift is or is not in execution of a power." In *Grant* v. *Lynam*, (4 *Russ.* 296,) the master of the rolls said: "A general gift of moneys, securities for moneys and other personal chattels, which are in their nature subject to constant change and fluctuation, stand upon very different principles from freehold property; and as to them, the will must refer to them as the subjects of the power, or they will not pass." In *Bradly* v. *Westcott*, (13 *Ves.* 444,) the testator authorized his wife to leave by will £500 and other articles. She made a will without any reference to the power, speaking only of "my personal estate," &c. and "all my estate and interest therein." The court held there was no execution of the power.

VIII. Parol proof being inadmissible to prove intention, it is incompetent to show in that way that the testatrix supposed or knew she was *in extremis*. (1.) Where the fact appears on the face of the will, (2 *Chance on Pow.* 97, § 1672,) no parol proof would be necessary; but even then the rule could have no exception without abrogating entirely the grounds upon which it exists. Suppose, for example, a testator having made a will, believing himself *in extremis*, should recover; that fact would not be allowed to change the rule that the will passes all personal property subsequently acquired. Unless the will be signed at the moment of death, there is opportunity for the personal estate to increase. (2.) The testator can not know whether he shall recover or die; his expectation may be defeated by the event; the law can not therefore infer that he knew that he would

have no other personal property. Where the testator has, or supposes he has, property to which the will can apply, the bequest is held to relate to that alone. If he have none, still, as he may acquire in future, there remains a subject for the will. Even if the fact that the will is made *in extremis* may affect the latter rule, it can not the former, for there is property in his belief to meet the will.

IX. If it be said that the will can not be satisfied without embracing the subject of the power, so it may be said, the will can not be satisfied as to the amount of legacies unless it be taken as a general will. If it be a general will, it can not in the same breath be an execution of the power.

X. The failure of the trustees to set apart and invest separately the fund in question could not affect the rule of law as to appointments, nor as to the intent of the testatrix. In whatever form it was placed or existed, the right to dispose of half of it was a mere power given by the will of Samuel Hicks. There should be a decree reversing the judgment at special term, and declaring that the will is not a valid execution of the power.

B. F. Dunning and *C. O'Conor*, for the respondents. I. Adopting the principles of § 126 in our statute of 1830 relative to powers, and perhaps improving on its phraseology, the parliament of Great Britain, on July 3, 1837, enacted, in substance that testamentary dispositions of *his* or *her* property made by the donee of a *general* power, such as that possessed by Mrs. Rieben, should be construed to include the property embraced by the power "unless a contrary intention shall appear by the will." (1 *Vict. ch.* 26, § 27.) Independently of this foreign statute, and without claiming, for the present, any aid from our own, the plaintiffs insist that according to the common law, as enunciated in the English judicial decisions, Mrs. Rieben's will should be adjudged a valid and effectual disposition of $50,000 under the power in her father's will 1. In order to evade restraints upon the

privilege of devising, (1 *Jarman's Powell on Dev.* 5, 6,) and also to facilitate dispositions of the realty *inter vivos*, (*Sugd. on Pow. 8th ed. ch.* 1, § 1, *subs.* 27, 28,) English conveyancers constructed a very artificial method of procedure by which an absolute *ownership* of real estate, with perfect control and unlimited authority to alienate, was enjoyed under the form of a mere *power*. 2. Though personal estate was of little account in the earlier stages of the English law, and was always transferable by very simple methods, yet its great increase in modern times, the durable character imparted to much of it, as public and corporate stocks, &c. and especially the practice of pledging and charging lands and creating long terms of years for this and other purposes, naturally led to the use of similar forms of settlement both as to realty and personalty. (*Williams on Personal Property, pp.* 1, 2, 7, 31, 234, 186, 195. *Smith on Real and Personal Property*, 159. 4 *Bac. Ab. Leases*, 2.) 3. Such powers became very common in England in modern times, yet so impalpable is the distinction between ownership under the form of a power and the most direct ownership that, even in that country, scarcely any persons except practiced experts in the art of conveyancing, ever realized or perceived the difference. The judicial mind could not retain it without an effort. (*Bradly* v. *Westcott*, 13 *Ves.* 452, 453. *Per Lord Rosslyn in Standen* v. *Standen*, 2 *Ves. jr.* 594; *affirmed in H. of L. 6 Bro. P. C., Tomk. ed. p.* 193.) *Jickling* (*on Legal and Equitable Estates, ch.* 28, 305,) as well as *Chance on Powers*, § 1678, calls them "powers of ownership," and in § 1675, *Mr. Chance* demonstrates the extreme subtlety of the distinction by showing that powers reserved by an owner on settling an estate, to his own use, stand "according to the general authorities on the same footing" as powers granted to a stranger. Our revisors of 1830, in their notes (3 *R. S.* 589, *2d ed.*) say: "In reason and good sense there is no distinction between the absolute power of disposition and the absolute ownership." They speak of the dis-

tinction, when applied in matter of substance, as "an affront to common sense." Their § 126 of the article concerning "*powers*" conforms to this view of the subject. 4. A multitude of post-revolutionary and, consequently, non-authoritative English decisions, exhibit a very injudicious effort by some judges to give weight and substance to this thin distinction, by laying down a *rule* that exacted from testators when exercising the "power of ownership," a peculiar style of speech. (1 *Sugd. on Pow. ch.* 6, § 7, *sub-sec.* 19, *Law Lib. ed. Story's Eq. Jur.* 1062, *a.*) It will be asserted that two or three cases decided prior to the revolution are to the same effect. This was an attempt at judicial legislation. Besides, it was repugnant to the principle that wills are informal instruments presumptively made *inops consilii*, to be construed according to the ordinary acceptation of words amongst the inexpert, and requiring no more than that the intent should be manifested with common certainty. The judges themselves did not generally approve the rule or always cheerfully obey it. In 3 *Vesey*, 470, Lord Alvanley, M. R. says: "I rather wish the court had taken another line in these cases, and had held that any general words would be sufficient to execute such powers; but I am not at liberty to say so." In 3 *Myl. & Keene*, 688, Sir John Leach speaks of "the distinction which has been adopted and settled in courts of equity between the power of disposing of property and the technical right of property," as "a distinction which has been regretted by many eminent judges." In 7 *Vesey*, 399, Lord Eldon says, that in acting on this rule the courts had been obliged to defeat the intention "nine times in ten." In *Roake* v. *Denn*, (4 *Bligh's P. C., new series*, 22.) Lord Wynford, speaking of the case before the court, says, nine hundred and ninety-nine out of every thousand would have thought it an exercise of the power. "Unfortunately we are confined by the rules which have been laid down. Rules with respect to *evidence of intention* are bad rules, and I trust I shall live to see them no longer binding on the judges."

More emphatic, if possible, is Vice Chancellor Knight Bruce, on a like occasion, (13 *Jurist Rep.* 384:) "I must, although almost ashamed to say it, decide against what I firmly and sincerely believe to have been the intention of the testatrix, that the power of appointment has not been exercised. I am bound, however, by the authorities; I can not help myself, and I must so decide." Mr. Humphreys, in his "Observations on the actual state of the English laws of real property, with outlines for a systematic reform," (2*d ed.*, *London*, 1827, *p.* 318,) condemning this distinction, recommends that a will, "however it acquired its force, should ever bear the same uniform character. Every needless distinction abolished," adds he, "affords a correspondent clearness of right and protection against litigation." Thus the attempted rule of the modern English cases which is relied upon by the defendants was, by the ablest English judges, and, indeed, on all hands, pronounced a mischievous construction. And at last, (July 3, 1837,) it was, as we have seen, reversed by act of parliament. This was in the same year and a few months prior to the date of Samuel Hicks' will. 5. Whilst it was in its fullest strength, this rule was constantly struggled against and avoided, or evaded on slight grounds of distinction. These very distinctions were always of equal force with the rule itself; and several of them apply to Mrs. Rieben's will, so that even under the English "judge-made law," prior to 1st Victoria, her intent could not have been defeated. We will proceed to call attention to some of these distinctions. 6. If it could be maintained that, by reason of her marriage being *before* the Married Woman's Acts of 1848 and 1849, Mrs. Rieben had not a general testamentary power, but only a right in equity under her father's will to appoint the $50,000, there could be no question in this case. If that were so, the paper called her will could have no effect as a will; and, according to the strictest of the English decisions, it would, for that very reason, be deemed an appointment of this $50,000. (*Standen* v. *Standen*, 2 *Ves. jr.*

594. *Bradish* v. *Gibbs*, 3 *John. Ch.* 523. *Sugd. on Pow ch.* 6, § 7, *subs.* 1 *and onward*, *Law Lib. ed. Best*, *Ch. J citing and explaining Sir Edward Clere's case*, *in Doe* v *Roake*, 2 *Bingh.* 505, 506, 9 *Com. Law Rep.* 500. *Mr. Sugden* (*Lord St. Leonards*) *on Lovell* v. *Knight*, 1 *Sugd. on Pow.* 424, *ch.* 6, § 7, *sub.* 55, *Law Lib. ed. Id.* 436, *ch.* 6, § 8, *sub.* 10, *citing Roscommon* v. *Fowke*, *Law Lib. ed. Churchill* v. *Dibben*, *by Lord Hardwicke*, 2 *Ld. Kenyon's Rep. part* 2, *pp.* 78, 82. *Curteis* v. *Kenrick*, 9 *Simons*, 443–446. *S. C.* 3 *Mees. & Welsb.* 467, *per Park*, *B.*) 7. Under the English rule it was always held that if, in any way, the judges could discover in the instrument relied upon as an execution of the power, an intention to give the property in question, that would suffice. So, if a testator having no real estate other than that embraced by a power, devised in terms *his real estate*, that was deemed a sufficient execution of the power. (*Wigram's Extrinsic Ev. 4th ed.* § 26.) If, in any way, a testator indicated that he considered any one thing which was only subject to his *power* to be adequately described by such words as *my* land, *my* property or *my* estate, then it was adjudged that such words, used by him in a general residuary devise or bequest or otherwise in the same will, would extend to *all* real or personal property over which he had merely a *power*. (*Dillon* v. *Dillon*, 1 *Ball & Beatty*, 77; *commented on in Sugd. on Pow. 8th ed. ch.* 7, § 7, *subs.* 96, 109, 111. *See* 1 *Story*, 453.) If he said "I give whatever I have any power to give," or the like, instead of using the possessive "*my*," then the difficulty was held to be obviated. (*Sugd. on Pow. 8th ed. ch.* 7, § 7, *sub.* 35.) 8. Mrs. Rieben's will was made when she was *in extremis* and in expectation of immediate death. This fact shows that she could not have contemplated *future* acquisitions. Her intent could only be to give what she had control over at the moment of making her will. This circumstance brings her will within the principle of a *specific* disposition, thereby indicating her intent to give the very thing which

was the subject of the power. According to the strictest of the modern English decisions this is sufficient. Though testimony of *words* not in the will is never to be admitted on a question of intent, (2 *Ball & Beatty*, 48; *Wigram's Extrinsic Evidence*, 4*th ed.* § 104,) there can be no objection to proof of *this fact*. Indeed, such a fact as that a party is *in extremis*, and contemplates death as inevitable, has been admitted to determine the most solemn cases. (*Vass' case*, 3 *Leigh*, 793. *Cowen & Hill's ed. of Phil. Ev. vol.* 1, 235, *note* 453. *Dunlop* v. *Dunlop*, 4 *Dess.* 320. *Wigram's Extrinsic Ev., proposition 5th, p.* 65, 4*th ed.; and see* §§ 69, 71, 74, *&c.* *Guy* v. *Sharpe*, 1 *Myl. & Keene*, 603. *Doe* v. *Beynon*, 12 *Ad. & Ellis*, 436.) Under the Scotch law, the validity of some dispositions of property depend entirely upon the fact whether or not they are made "by a person on death-bed." (*Miller* v. *Marsh*, 2 *McQueen's H. of Lords Cases*, 285. *Crawford* v. *Coutts*, 2 *Bligh*, 660.) So as to the nuncupative will of English and American law. (*Prince* v. *Hazelton*, 20 *John.* 514. *Williams on Personal Prop.* 235, 236.) "Every claimant under a will has a right to require that a court of construction, in the execution of its office, shall place itself in the situation of the testator, the meaning of whose language it is called upon to declare. It follows that if, with the light which that situation affords, the testator's meaning can be determined by a court, the court which so determines does, in effect, declare that the testator *has expressed* his intention with certainty." *Wigram's Extrin. Ev.* 4*th ed.* § 96, *and cases in notes. Smith on Real and Personal Prop.* 776. *Wolfe* v. *Van Nostrand*, 2 *Comst.* 440.) Thus placing itself by means of the extrinsic evidence "in the situation of the testatrix," when her will was made, the court is enabled to see clearly that, as she could not have contemplated *future* acquisitions, and as her other assets were wholly insufficient to satisfy her bequests, she must have intended to execute her power. There are several post-revolutionary English determinations against admit-

ting, in this class of cases, evidence that the testator's own proper personal assets were insufficient, or that he had none. But these determinations do not go upon the ground that such evidence is in its nature incompetent. They rest upon a reason which is quite just, but which is inapplicable to the case of a testament made *in extremis*. None of the English cases presented that feature, except *Lownds* v. *Lownds*, (1 *Y. & Jervis*, 447.) In that case the power was held to have been executed. Under the old law, no lands could pass by will except those held at the date of the will; consequently every devise was deemed to be specific, and every devisor was understood as having in view the existing state of things only, and as intending to give only the particular lands *then* under his control; whereas a general bequest has always been held to include whatever personalty the testator might have at that future period when his death should happen. For this reason, evidence of the want of real assets was received, but evidence of the state of personal assets was rejected as inconclusive. It would throw no light upon the question of intent. (*Innes* v. *Sayre*, 7 *Hare*, 381. *Dummer* v. *Pitcher*, 2 *Myl. & K.* 277. *Jones* v. *Tucker*, 2 *Merivale*, 537. *Lake* v. *Currie*, 13 *Eng. Law and Eq.* 489. 2 *De Gex, McN. & Gordon*, 547. *Wigram's Extrin. Ev. 4th ed.* §§ 26, 27, 103, 104. *Nannock* v. *Horton*, 7 *Ves.* 399. *Webb* v. *Honnor*, 1 *Jac. & Walk.* 357. *Mattingly's Trusts*, 2 *John. & Hem.* 426. *Gorden* v. *Dotterill*, 1 *Myl. & K.* 57, 58.) On this latter point, however, the English cases are somewhat conflicting. (*Jones* v. *Jones*, 13 *Irish Ch. R.* 409. *Sugd. on Pow. 8th ed. ch.* 7, § 7, *subs.* 62, 64, 65.) The fact that the will was made *in extremis* takes this case entirely out of this reasoning, and renders it proper to look into the state of the testatrix's assets. 9. Apart from the mere insufficiency of the assets, the very peculiar wording of Mrs. Rieben's will affords a ground for calling in aid "the situation of the testatrix." And the very *words* of the will, when read in the light of that situation, plainly

manifest an intention to execute the power. Very slight circumstances have been laid hold of by such eminent jurists as Lord Redesdale, Sir William Grant and Sir James Mansfield to support the intent in this class of cases. (*Bradly* v. *Westcott*, 13 *Ves.* 453. *Wright* v. *Cadogan*, 2 *Eden*, 258.) The whole scope of the will shows that, by the phrase "the remainder," the testatrix refers to something else than the general residue of her own estate. It is "the remainder" of some particular fund or property which she had in view, and which fund or property, as is often the case, can not be ascertained from the will itself. Hence there is an ambiguity as to *the subject of the gifts.* This circumstance alone lets in extrinsic evidence to *identify* the subjects. (*Wig. Extr. Ev. 4th ed.* § 103. *Fonnereau* v. *Poyntz*, 1 *Bro. C. C.* 480, *and notes to Perkins' ed. Druce* v. *Dennison*, 6 *Ves.* 401–404. *Innes* v. *Sayre*, 7 *Hare*, 383.) The extrinsic evidence does not contradict any description of the fund found in the will. It harmonizes perfectly therewith. (2 *Brod. & Bing.* 553.) On looking into her situation, we find that, both in form and in substance, the brothers had wholly disregarded the rules of law and equity, as well as the plain and positive injunctions of her father's will concerning the investment and management of her estate. The whole $50,000 left to her disposal by her father, together with all savings from the income of this and her other property left by him to her use, constituted one undistinguishable and indivisible mass in the hands of the same person or persons. Can there be any doubt that she meant "*the* remainder" of that mass or fund regarded as an entirety? (*Innes* v. *Sayre*, 7 *Hare*, 382, 383. 3 *McN. & Gordon*, 613. *Sugd. on Pow. 8th ed. ch.* 7, § 7, *sub-sec.* 67. *Amory* v. *Meredith*, 7 *Allen's Mass. Rep.* 401.) V. C. Wigram in 7 *Hare*, 382, and Denio, J. in 3 *Kern.* 104, show that bequests in reference to a question of intent may be regarded as "in some sense specific," though they could not be so deemed for all the general purposes for which that distinction is established. She used her father's will as a guide or

precedent in selecting her husband to be recipient of *the* $50,000; and she reverted to *the* $50,000, intended for the husband after she had disposed of her own property. These are two strong indications of her intent. The whole of these circumstances taken together prove the pecuniary legacies to be a *specific* disposition of this entire fund. (*Loring* v. *Woodward*, 41 *N. H. Rep.* 394. *Lake* v. *Currie*, 13 *Eng. Law and Eq.* 489.) When it is considered that by their method of keeping the property, and their whole course of dealing with it, the brothers *taught* this lady to regard the fund in this way, a court of justice "should pause very much before setting aside," at their instance and for their benefit, her disposition framed in that very view of it. (*Griffin* v. *Nanson*, 4 *Ves.* 356.) 10. The $50,000 fund, so carefully guarded by the father as to be entirely exempted from any discretionary control on the brothers' part, had no actual existence when her will was made. In its place there was merely a chose in action. She had a right to compel them to place such a sum at her disposal. *This* right was her own property. It would be a great perversion of justice if *they* could be permitted to defeat her will by an imported cavil founded on her omission to observe a distinction which, throughout her life, they had themselves so completely disregarded, thus inducing her to overlook it. 11. In the English cases a great deal of difficulty has grown out of the decedent's use of the word "*my*" in reference to the property intended to be given. This was thought to indicate affirmatively an intent to give only that in which the party had, in the strict technical sense, an interest or property. The testatrix in this case, when speaking of the money intended to be given, wholly omits that word or any equivalent, but she applies it to her chattels in possession. The use of the word in the latter case gives pointed emphasis to the omission of it in the former. Viewed in the light thrown upon it by this contrast, (*Maples* v. *Brown*, 2 *Simons*, 327,) the omission is quite equivalent to the expression "by any power I may

have." Under the English cases this idea, if written in the will, or fairly to be implied from its provisions, (2 *Eden*, 258,) is fully sufficient to rescue the intent. Decisions on the effect of the word "my:" 13 *Ves.* 452, 454; 1 *Swanst.* 73; 3 *Ves.* 470; 3 *Simons*, 279; 7 *Ves.* 400; *Wigram's Extrin. Ev.* §§ 26, 27, *4th ed.* "The absence of that expression [my] makes this a much stronger case in favor of the execution of the power." (*Per Romilly, M. R., Banks* v. *Banks*, 17 *Beavan*, 354.) 12. If this case had arisen in England prior to 1 *Vic.* its special circumstances would have turned aside the poisoned shaft aimed at the intent. Any English judge would have said of it, as Lord Northington expressed himself in 2 *Eden*, 258: "Contrary to the illiberality which prevailed in ancient times, when with subtilty, narrow reasoning and technical prejudice, they required the nicest exactness and scrupulous forms in carrying people's intention into execution, * * a number of cases have now said that where the intention was to pass at all, the judges are *astuti* to find it sufficient." And "it is a very wise principle."

II. We have shown the origin, the life and the death of the pernicious foreign dogma on which the defendants rely. It was not firmly established whilst English parliaments or English judges had authority to make law for us; and it has "never yet been followed in this country." (1 *Kern.* 49. 8 *Peters*, 660.) Of post-revolutionary creation, its feeble and contentious life had terminated even before the date of Samuel Hicks' will. Under these circumstances, the benign principles of decision in the interpretation of wills which have been uniformly observed in America forbid its introduction to defeat the manifest intent, through mere deference to English decisions which were never authoritative *here*, and are now obsolete at home. (*Peter* v. *Beverly*, 10 *Peters*, 564. 1 *Washington's Va. Rep.* 271, 272. *King* v. *Ackerman*, 2 *Black's U. S. Rep.* 413.) 1. After its extinction by act of parliament, it can not be permitted, like the vampyre of eastern fable, to arise from its grave, cross the wide Atlan-

tic and here exercise the privilege of working injustice which is no longer accorded to it in the land of its birth. (*King* v. *Ackerman*, *Id.* 564.) 2. There are in the English books but two cases decided prior to the revolution which are ever referred to as precedents for this rule. (6 *Co.* 18. 1 *Atk.* 559.) Those two cases relate to real estate, and they do not sustain the post-revolutionary decisions. The latter are not themselves authority in this country. 3. Powers in trust, that is to say, powers to executors and other fiduciaries to make dispositions of property for some specified purpose, as to pay debts or legacies, or for facility of distribution among children or next of kin, &c. have been extensively used in this country, and have given rise to considerable forensic discussion. But, until a very recent period at least, the *power of ownership* so common in English practice was scarcely known in America. Though "in England found in almost every conveyance," the revisors of 1830 say that "powers are almost unknown in this state." (3 *R. S.* 2*d ed.* 592.) Hence, no doubt, the lack of fuller or *more verbose* provision in their work for obviating doubt in cases like the present. Their statement was true. *Bradish* v. *Gibbs* (3 *John. Ch.* 523) is the only case of such a power in the New York reports, prior to that date. The first edition of Story's Equity Jurisprudence, published in 1836, contained no statement of the modern English judicial puzzle on this subject. It first appeared in a subsequent edition. (§ 1062, *a.*) The copious and masterly collection of American decisions, called the "United States Digest," first acknowledged their existence as a class in 1852. (*See Annual Dig. for* 1852, *vol.* 6, *tit. Devise and Legacy*, *I*, *c.*) 4. When cases belonging to this class of powers did arise in this country, the modern English doctrine was not approved or followed. (*Blagge* v. *Miles*, 1 *Story's Rep.* 445 *to* 450 *Andrews* v. *Brumfield*, 32 *Miss. R.* [3 *George*] 115 *to* 118. *Crane* v. *Morris' lessee*, 6 *Peters*, 619, 620. *Amory* v. *Meredith*, 7 *Allen's Mass. R.* 397, 400.) The American rule is, that "To the due execution of a power, a

recital of it, or even an express reference to it, is not necessary. The intent to execute it is matter *in pais*, to be collected from all the circumstances." (*Curtis' U. S. Digest*, 379. *Crane* v. *Lessee of Morris*, 6 *Peters*, 620. *Carver* v. *Jackson*, 4 *id.* 98, 99.) Mr. Justice Story, in a note to his son's reports, (*vol.* 1, *p.* 458,) thus refers to the statute of 1st Vict.: "The doctrine, therefore, has settled down, in that country, to what seems to be the dictate of common sense, unaffected by technical niceties."

III. If the distinction between *interest* and the absolute *power of disposition* ever had a place in the law of this state relative to the exposition of wills, the statute of 1830 concerning powers entirely abrogated it. (1 *R. S.* 1*st ed.* 737, § 126.) 1. Although this section speaks only of "lands," it establishes a rule of construction which should also be applied to personal estate. (*Van Wert* v. *Benedict*, 1 *Bradf.* 123.) 2. Title to real and personal estate, so far as it depends upon rules of judicial exposition, should be governed by the same principles; and it would be a reproach to the law if the same words should be judicially expounded as indicating a different substantive intent when applied to personal property, from their judicial acceptation when applied to the realty. The judges have uniformly established a substantial analogy of interpretation and effect for the same words of grant, notwithstanding technical or formal differences in the kind of property or of interest intended to be conveyed. (*Patterson* v. *Ellis*, 11 *Wend.* 300, 301, 266. *Preface to Jickling's Analogy between legal and equitable estates.*) The legislature has indicated a like policy. (1 *R. S.* 1*st ed.* 773, *title* 4, *and especially* § 2. 2 *R. S.* 57, § 5. *Id.* 63, § 40.) 3. The distinction between ownership in other forms and ownership under the form of a general power, was originally introduced from the law of powers over the realty, and applied to personal property by analogy. It would be very singular if the shadow were to continue after the substance had passed away. *Cessat ratio cessat et ipsa lex.* When

framing their code, the revisors of 1830 seem to have been altogether oblivious to the notion that the *power of ownership* might be applied to personal property. (1 *R. S.* 1*st ed.* 732, § 74.) They were quite justified in ignoring it. That power had, in respect to personal property, no practical existence in this country. When they recognized *powers*, as a means of exercising dominion over property, and affirmed that they applied to real property only, the distinctive character given to such powers over personalty by English judges was, by a necessary implication, virtually annulled. Thenceforth they stood on the same precise footing as all other property belonging to the grantee or reservee.

In any view that can be taken of this case, the judgment is right; and it should be affirmed, with costs.

SUTHERLAND, J. The question in this case is: Did Mrs. Rieben, by her will, exercise, or execute, the general power of appointment, given to her by the will of her father, over $50,000 of the $100,000 which he directed to be kept invested for her use, during her life?

If the question were a question of intention, on the will of Mrs. Rieben, and *the evidence in the case*, there could not be a doubt that her will should be deemed a due execution of the power, and that the judgment of the special term should be affirmed. But the question in the case really is, as to the admissibility of certain evidence, to show that she intended by her will to execute the power.

As to all the evidence as to what the testatrix said, at or about the time she executed her will, it is not claimed by the counsel for the plaintiffs that it was admissible, in any view of the case; and it clearly was not; for as to what she said, the will alone can speak. No words of the testatrix, except those in the will, could properly be proved.

If the question in the case was as to the interpretation of the will *as a will disposing of the testatrix's own property, only*, there would not be any question in the case; for then

there could not be a doubt that all the evidence to show the situation of the testatrix at the time she made her will; that she made it *in extremis;* and all the evidence relating to the property or fund disposed of, or claimed to have been disposed of, would have been admissible.

It is a general rule of evidence, that for the purpose of construing and giving effect to the intended operation or effect of a written contract, the situation of the parties, and the situation or condition of the subject of the contract, at the time, and generally the circumstances under which the contract was made may be shown; not for the purpose of showing what the parties intended to say in the contract, but for the purpose of ascertaining the meaning of what they have said in the contract; not for the purpose of showing the intention intended to be expressed in the contract, but for the purpose of showing the expressed intention. This rule of evidence applies, with all its force, and to its full extent, in the interpretation of a will operating, or intended to operate, *as a will simply*, and not as the execution of a power. (*Wigram's Extrinsic Ev. proposition* 5, *p.* 65, *4th ed.*)

I have examined many of the cases referred to by the counsel, in the principal case, and many others, as to the law in England relating to the execution of powers by wills when the act 1 *Vict. ch.* 26, effecting so great a change, was passed; and my conclusions on that point, so far as it has been discussed by the counsel, and so far as it may be of any importance in this case, are as follows: 1st. If the party, claimed to have executed a power by will, had no power to make a will—that is, had no general testamentary power—if she was a married woman, for instance—that the will, or instrument so called, might be deemed an execution of the power, though it did not refer to *the* power, or to any power generally; and though the subject of the power was not mentioned or referred to in it. (*See Shelford* v. *Acland*, 23 *Beav.* 10.) But as to this point there is considerable doubt. (*See Lovell* v. *Knight*, 3 *Simons*, 275; *Lempriere* v. *Valpy*, 5 *id.*

108.) In many of the cases cited by the counsel for the plaintiff, on this point, the subject of the power was real estate, and there was a general devise, and these cases do not apply.

2d. The language of the whole will, taken together, might give the will the effect of an appointment under the power. It was sufficient if it appeared, in any way, on the *face of the will*, that the testator did not consider himself as disposing of his own property, but as executing a power. (*Hawkins on the construction of Wills, p.* 24; *Hunloke* v. *Gill*, 1 *R. & My.* 515, *there cited. Churchill* v. *Dibbin*, 2 *Lord Kenyon's Rep. part* 2, *p.* 69. *Dillon* v. *Dillon*, 1 *Ball & B.* 77. *Doe* v. *Roake*, 2 *Bing.* 497.)

3d. The will might be deemed an execution of the power, without referring to the power, or any power, if the subject of the power was mentioned or referred to.

4th. If the subject of the power was lands, or lands in a certain county, a general devise of all the testator's real estate, or all his real estate in that county, was deemed an execution of the power, if the testator had no real estate of his own, or no real estate of his own in the county, though the will did not refer to the power, or in any other way to the subject of the power; and though there was nothing on the face of the will to show that the testator did not consider himself as disposing of his own real estate. (*Standen* v. *Standen*, 2 *Ves. jun.* 589. *Denn* v. *Roake*, 6 *Bing.* 475.)

5th. But if the subject of the power was personal property, the rule was that you could not look beyond the face of the will for an intent to execute the power. (*Molton* v. *Hutchinson*, 1 *Atk.* 558. *Andrews* v. *Emmet*, 2 *Brown's Ch.* 297. *Nannock* v. *Horton*, 7 *Ves.* 391. *Sayer* v. *Sayer*, *Innes* v. *Sayer*, 7 *Hare*, 27 *Eng. Ch.* 376. *Sibley* v. *Perry*, 7 *Ves.* 523. *Grant* v. *Lyman*, 4 *Russ.* 296. *Webb* v. *Honner*, 1 *J. & Walk.* 532. *Jones* v. *Tucker*, 2 *Meriv.* 533. *Bradley* v. *Westcott*, 13 *Ves.* 444.)

The truth is, these English cases, only a few of which have

been referred to, did not put the execution of a power by a will on the ground or question of intention. By force of precedent, (and it may be said by the conservative force of precedent,) they settled and established a technical rule that a will to execute a power must have certain features on *its face*, irrespective of the intention. It was conceded, in many of the cases, that the operation of the rule was to defeat the intention; and hence the act of parliament. Mr. Sugden thus states the rule: "Before the statute (1 *Vict. ch.* 26) it was firmly settled, that a mere general devise or bequest, however unlimited in terms, would not comprehend the subject of a power, unless it referred to the subject, or to the power itself, or generally to any power vested in the testator." (*Sugd. on Pow. 8th ed.* 301, § 35.) Again he says, that before the statute the rule was universal, that where "the power was not referred to, the property comprised in it must be mentioned, so as to manifest that the disposition was intended to operate over it; the donee must do such an act as shows that he had in view the thing of which he had a power to dispose." (*Id.* 300, §§ 31, 32.) It is plain that this rule involved the exclusion of all evidence of extrinsic facts to show intention, when a will by which a power was claimed to have been executed did not, on its face, come within the rule. What was the use of receiving such evidence, if the will, on its face, was not within the rule?

It is of no importance, in this case, whether the rule before mentioned, that a general devise, where the subject of the power was real estate, might carry the subject of the power, when the testator had no real estate of his own, was, or was considered to be, a qualification of, or an exception to, the settled rule as stated by Mr. Sugden. But to show the shadowy distinctions to which this qualification of, or exception to, the general rule lead, compare *Jones* v. *Curry*, (1 *Swanst.* 66.) with *Standen* v. *Standen*, (2 *Ves. jun.* 589.)

The most difficult cases to reconcile are the cases where the question was, whether the subject of the power was referred

to or mentioned in the will, within the rule. Compare *Innes* v. *Sayer*, (3 *Man. & G.* 606, *and* 7 *Hare*,) *Lownds* v. *Lownds*, (1 *Y. & J.* 445,) and *Walker* v. *Mackie*, (4 *Russ.* 76,) with *Nannock* v. *Horton*, (7 *Ves.* 391,) and *Jones* v. *Tucker*, (2 *Meriv.* 533.)

If the property subject to the power was so mentioned or described in the will, or by the bequest, as to make the bequest *specific*, then the will might be held to execute the power, and then evidence of extrinsic facts as to the circumstances of the testator's property might be received, to show *that the property so mentioned or described in the will, or specific bequest, was the subject of the power.* (*See cases last cited, and Innes* v. *Sayer*, 7 *Hare, and* 3 *Man. & G. before cited.*)

So far as our decision of the question of evidence, in the principal case, can or ought to be controlled, or influenced, by the English rule or cases, it is sufficient to say, that it appears to have been perfectly settled, when the act 1 Vict. was passed, that when the subject of a general power of appointment was personal property, evidence of the state or circumstances of the testator's personal property was not admissible, nor indeed of any extrinsic fact or circumstance to show that he intended by a general bequest to exercise his power of appointment.

Now I think Mrs. Rieben had a general testamentary power, notwithstanding her coverture, under the married woman's act of 1848, as amended in 1849; and if she had, as the will does not refer to any power, and as there is nothing on the face of the will to indicate that she did not consider herself as disposing of her own property, it is plain that, by the English cases and the English rule, the will was not an execution of the power, and could not be shown by evidence of any extrinsic fact or facts to have been intended to be an execution of the power, unless it can be said to mention or refer to some *specific* fund or property, out of which she intended the legacies to be paid. Though there are features

of the will which render it probable that the testatrix, in wording it, had in view a particular *amount* of property or money, I do not think it can be said that the will *mentions*, or *refers to*, any *specific* fund or property.

If, then, the question of evidence, presented by the appeal, is to be decided by the English cases, and the English rule, we must reverse the judgment of the special term, and declare that not any of the evidence as to extrinsic facts was properly received.

If the will had referred, in any way, to the $100,000 of which Mrs. Rieben had the use for life, possibly that might have been sufficient to let in evidence of extrinsic facts. But considering that *Molton* v. *Hutchinson*, (1 *Atk.* 558,) is the only English case, prior to the commencement of our revolution, (*Const. of N. Y., art.* 1, § 17,) referred to, that is strictly in point, (that being the case of a general bequest;) that the English rule as to general bequests, and in certain other respects, has been abolished by statute; that the reason for the distinction between a general devise, and a general bequest executing a power, no longer exists: considering the American cases, *Blagge* v. *Miles*, (1 *Story's Rep.* 445 *to* 450,) and the late case of *Amory* v. *Meredith*, (7 *Allen's Mass. Rep.* 397;) and considering that it is not and never has been reasonable, that the will of a party having a general and absolute power to dispose of property should be defeated, because he treated the property, by the will, as his own; I am of the opinion that the evidence as to the circumstances or condition of the property or fund in the hands of Mrs. Rieben's brothers; the evidence to show that her own savings or property was not sufficient to answer the special legacies; and indeed, that all the evidence of extrinsic facts, as distinguished from what the testatrix said, was properly received; and that the judgment of the special term should be affirmed, with costs to the respondents, to be paid by Henry W. Hicks.

I do not see that the provision, 1 *Rev. Stat.* 737, § 126, or

the enactment of that provision, has any weight as an argument, on either side of the question.

LEONARD, J. I am satisfied with the conclusion that the will should be held to be a valid execution of the power.

GEO. G. BARNARD, J. also concurred.

Judgment affirmed.

[NEW YORK GENERAL TERM, November 7, 1864. *Leonard, Geo. G. Barnard* and *Sutherland*, Justices.]

PIERRE RIEBEN, husband of Eliza Hicks Rieben, deceased, *appellant, vs.* HANNAH T. WHITE, and JOHN J. MERRITT, administrator &c., and others, *respondents.*

A trust for the benefit of an unmarried female, accompanied by a limitation of the income of the trust property to her sole and separate use, for life, free from the control or interference of any future husband, created prior to the acts of 1848 and 1849 for the more effectual protection of the property of married women, will prevent a husband whom she may marry subsequent to those acts, from acquiring, by the marriage, any vested rights, in the wife's lifetime, in or to her *savings from her income.* And those acts give to the wife the power to dispose of such savings, by will.

If she dies without having disposed of such savings, or of the property arising therefrom, by will or otherwise, her husband, on her death, will be entitled, in his marital right, to such savings or property. *Per* SUTHERLAND, J.

APPEAL from a decree of the surrogate of the county of New York, made on passing the accounts of John J. Merritt, administrator &c. of Eliza Hicks Rieben with the will annexed. Samuel Hicks, father of the testatrix, died in the city of New York in 1837. He devised to his executors a house, &c. on Broadway in trust, among other things, to receive the rents and profits thereof, and pay the same over

to her as received, during her natural life. He also bequeathed to his executors $100,000 to be invested and the income paid over to the testatrix during her life. In the event of her marriage, he directed that the income of the said personal fund "and also the rents and profits of said house, &c. be paid to her on her separate receipt, as a voucher, and for her sole and separate use and benefit, and free from the control, debts or interference of her husband." And upon her death without issue, "then in trust to pay over one half thereof, to wit, $50,000, to such person or persons, whether her husband (if she be married) or otherwise, as she may by last will and testament appoint." The testatrix married Pierre Rieben, the appellant, December 15, 1847, and died without issue May 20, 1855. Letters of administration, *with her will annexed*, were issued to John J. Merritt, October 6, 1857. The sum of $50,000, over which Mrs. Rieben had said power of appointment, remains in the hands of her father's executors, to be accounted for by them, with interest from her death, to the person or persons who may be entitled to the same. Certain clothing, jewelry and personal effects, valued at $4392.91, in Mrs. Rieben's possession at her death, which were purchased by her out of the savings of her income under her father's will, were bequeathed in her will to her cousins, Elizabeth White and Sarah Hicks White. Merritt, the administrator, delivered these articles to said legatees accordingly. The surrogate's decree, now appealed from, allowed and approved this disposition. Mr. Rieben's counsel objected to the decision, before the surrogate. And he, in like manner, objects to the same on this appeal. Merritt, as administrator of Mrs. Rieben, cited the father's executors to account, and on May 9, 1858, obtained a decree against them for the income of her separate estate not previously paid over to her. The whole fund in the hands of Merritt, as administrator, and for which he was held or claimed to be accountable in the present proceedings, was shown to be "savings of income of the fund and land held in trust for

her [Mrs. Rieben] under the will of her father." Mrs. Rieben's will is dated May 19, 1855. It takes no notice of her father's will. Its material parts are in the following words: "In this my last will, I give to my husband, Pierre Rieben, $50,000; to my aunt, Hannah T. White, $20,000, to buy a house; to my cousin, Samuel Hicks Seaman, $5000; to my cousin, Maria W. Corlies, $1000; to Fanny Haff, $1000; to Luther Terry, [of Rome,] as a trifling return for his many acts of brotherly kindness, $5000. The remainder to be equally divided between my cousins, Elizabeth White, Sarah Hicks White and Cornelia White." The surrogate by his final decree, made November 7, 1860, directed the administrator to pay $34,575.51, being the whole sum in his hands, among Mrs. Rieben's said legatees *pro rata*. On behalf of the husband, it was objected in the petition of appeal that the wife had no power to bequeath the savings of her separate estate, but that the same was his individual property, by virtue of his marital right as husband of the testatrix, and became vested in him absolutely, by law, by, upon and in virtue of his marriage with her prior to the enactment of the married woman's acts of 1848 and 1849; and that no will made by her could dispose of said property. And it was contended that the will made by Mrs. Rieben was merely an execution of the power of appointment as to the $50,000, conferred upon her by her father's will. It does not appear by the return in any way, directly or indirectly, nor could it be inferred, that any portion of the funds which came to the hands of Merritt, the administrator, were savings from Mrs. Rieben's *ante-nuptial* income. The objections presented by Mr. Rieben to the administrator's account were in writing. They suggested no such point, but merely claimed that the whole income of the provision made by her father for her use became the husband's property *jure mariti*, and that "*any* will executed by Mrs. Rieben could only affect the" $50,000 of capital over which she had a power of appointment.

Pierre Rieben, the husband of the testatrix, appealed from the decree of the surrogate.

Edw. F. Delancey, for the appellant.

C. O'Conor, for the respondents.

By the Court, SUTHERLAND, J. The trust property, (the $100,000 and the real estate on Broadway,) to the income of which Mrs. Rieben was entitled under her father's will, was not vested in her in her lifetime, but in her brothers as trustees; and by the terms of the trust she was to have the income thereof, during her life, for her sole and separate use.

It can not be said, I think, that her husband, by the marriage, acquired in her lifetime any vested right to, or interest in, the income, or her savings out of the income; for in equity the income and savings were protected from her husband and his creditors, by the trust, and the limitation of the income to her separate use. (*Jaques* v. *Methodist Epis. Church*, 17 *John.* 548. *Molony* v. *Kennedy*, 10 *Simons*, 254. *Proudley* v. *Fielder*, 2 *My.* & *K.* 57.) The last two cases, which are referred to by the counsel for the appellant, also show that even such part of the savings or such property existing from the savings, as may have been in the actual possession of Mrs. Rieben at the time of her death, whether cash, bank notes, or chattels, was her sole and separate property, and as such protected against her husband, in her lifetime, equally with the savings or accumulations of the income, in the hands of her brothers, and which had never been paid over to her.

It appears by the English cases that not only the post-nuptial, but also any ante-nuptial savings out of the income of the trust property limited to her sole and separate use, would have been considered her sole and separate property, and as such would have been protected, in her lifetime, from her husband. (*Newland* v. *Paynter*, 4 *Myl.* & *Craig*, 408,

417, 418. *Davis* v. *Thorneycroft*, 6 *Simons*, 420. 2 *Story's Eq. Jur.* § 1384, 7*th ed. and cases there cited.*)

It appears from the return of the surrogate that the clothing, jewelry &c. specifically bequeathed by Mrs. Rieben, were purchased by her from the savings of the income limited to her sole and separate use, and that all the moneys and securities in the hands of her administrator with the will annexed, came from like savings.

Except the $50,000, over which she had the general power of appointment, it is to be inferred that Mrs. Rieben could not dispose of, and did not intend by her will to dispose of, any property which did not arise or come from these savings. Probably it should be inferred, from the return, that these savings were all post-nuptial.

It can not be doubted, if Mrs. Rieben had died without having disposed of these savings, or the property arising therefrom, by will or otherwise, that her husband, on her death, would have been entitled, in his marital right, to such savings or property. (*Stewart* v. *Stewart*, 7 *John. Ch.* 229. *Molony* v. *Kennedy*, 10 *Simons*, *before cited.* *Ransom* v. *Nichols*, 22 *N. Y. Rep.* 114. *Rider* v. *Hulse*, 33 *Barb.* 264. *S. C.* 24 *N. Y. Rep.* 372.) Nor can it be doubted, I think, if her marriage had taken place subsequent to the act of 1849, amending the married woman's act of 1848, that Mrs. Rieben could have disposed of such savings, or property, by will, under the acts, though her separate property, not by the acts, but by the trust, and the limitation of the income of the trust property to her sole and separate use.

But it is insisted, on the part of the appellant, as the marriage took place before the amendment of the act of 1848, by the act of 1849, so as to give the power of devising, that by the marriage he acquired vested rights, which could not be interfered with or taken away by her will, under the acts. In my opinion the trust, and the limitation of the income of the trust property to the sole and separate use of Mrs. Rieben, prevented his acquiring, by the marriage, any

such vested rights in her lifetime, or to her savings from the income. I think the right which he did acquire by the marriage to succeed to the savings of her sole and separate income, in case he survived her, and in case she did not dispose of them by will or otherwise, was not, and can not be called, a vested right, so as to raise the constitutional question. I think, while the trust and the limitation of the income of the trust fund and property to her sole and separate use, protected her savings from the income from her husband, in her lifetime, and prevented him from acquiring by the marriage any vested right, *in her lifetime, to or in these savings*, the married woman's acts gave her power to dispose of them by will. I see nothing inconsistent in the two parts of this proposition. I think the cases of *Westervelt* v. *Gregg*, (2 *Kern.* 205,) and *Rider* v. *Hulse*, (*supra*,) do not apply, because the savings were the sole and separate property of Mrs. Rieben, by the trust and the limitation of the income of the trust property to her sole and separate use. In *Rider* v. *Hulse*, (33 *Barb.* 267,) Justice Brown says: "The effect of the acts of 1848 and 1849 upon such estates [estates settled upon a married woman for her sole and separate use] is to convert the equitable into a legal title in the wife, when there are no trustees, and when there are trustees vested with the legal title, to authorize a conveyance thereof to the wife under the limitations prescribed in section two of the act of 1848. It results, therefore, from this view, that if the choses in action in controversy, or the money and property which they represented, was the separate estate of Elizabeth Ryder at the time the acts referred to took effect, the plaintiff has no title thereto, which he can assert, as against the bequest of the wife, because the act of 1849 expressly authorizes a married woman to convey and devise real and personal property, and any interest and estate therein, in the same manner, and with the like effect, as if she were unmarried."

I see no reason to doubt the correctness of this view of the

operation of the acts of 1848 and 1849, as to the sole and separate estate or property of a married woman, when the acts took effect.

My conclusion is, that the decree of the surrogate should be affirmed, with costs.

Decree affirmed.

[New York General Term, November 7, 1864. *Leonard, Geo. G. Barnard* and *Sutherland*, Justices.]

WILLET, administrator &c. *vs.* STEWART and others.

It is too late, at the trial, to object that the complaint and summons vary; that the summons is under the wrong subdivision of section 129 of the code of procedure, to justify the complaint filed and served.

That objection should be presented by motion, in order that an amendment may be made, on just terms.

It is a breach of a deputy sheriff's official bond, if he fails to pay over money collected by him on execution, even if the sheriff should never be sued, or made to pay the amount.

The deputy's liability depends solely upon his own omission to pay over to the sheriff, and not in any manner upon what becomes of the money after the sheriff receives it, or who is entitled to it. SUTHERLAND, J. dissented.

THIS is an action brought by J. C. Willet, late sheriff of New York, against Stewart, as principal, and Perry and Bean, as sureties, upon a bond given by Stewart upon his appointment by the plaintiff as deputy sheriff; his term of office commencing January 1st, 1856, and ending December 31st, 1858; the plaintiff's term of office continuing the same length of time. Willet having died, the action was continued in the name of his administrator. The breach complained of was, that the plaintiff had paid to one Kilbreth, trustee of the Ohio Life Insurance and Trust Company, five hundred and sixteen dollars, for certain furniture which Stewart sold, in May, 1858, by virtue of an execution against said company. The complaint alleged that the plaintiff had been

sued by the trustee of said company, and judgment rendered against him, on the 12th of December, 1862, for the amount of said furniture. The answer in this case admitted that the plaintiff was sheriff during the time above mentioned; that Stewart was deputy during the same time, but denied that he received any process against the Ohio Life Insurance and Trust Company; or that he sold any property of the company; or that the plaintiff had paid any money in consequence of the defendant Stewart's act. It also alleged, that if the plaintiff paid Kilbreth any thing, it was voluntary, and not from necessity, or by compulsion of law; that if so paid, it was in his own wrong. The answer also set up the statute of limitations, as to any claim that could have been made against the plaintiff by the trustee, and also to the claim against the defendants in this case. The evidence given about process having been handed to the sheriff, and delivered to the defendant Stewart, was by parol only, and was received under an objection by defendants' counsel. The kind of process, and what it directed should be done by the sheriff, or whether it was directed to the sheriff, did not appear. Parol proof was given, under objection by the defendants' counsel, that an auctioneer sold furniture in 1858, by virtue of an execution against the Ohio Life Insurance and Trust Company, and that he was directed to sell such furniture by Stewart, the defendant. The announcement at the sale, by the auctioneer, was as follows: "I made the announcement that it was by virtue of several executions, and by the order of the sheriff of the city and county of New York, and the sale went on. Stewart was present at the sale." Proof was also given that the plaintiff had been sued by Kilbreth, trustee &c., more than four years after the occurrence, for the furniture sold by the auctioneer above mentioned; that the plaintiff, instead of defending the action by pleading the statute, or giving the defendants notice of said suits, confessed a judgment and paid the same, in December, 1862. There was no evidence that any of the money arising from

said sale ever came to Stewart's hands, or that the plaintiff ever requested Stewart to return the execution or process, or demanded of Stewart the money for which the furniture sold. And the judge refused to the counsel for the defendants the right to sum up the case, or the jury to take the case, and charged them that they must find a verdict for the plaintiff for $534 damages, which they did accordingly. The defendant Stewart appealed from the judgment.

G. L. Walker, for the appellant.

A. J. Vanderpoel, for the respondent.

Geo. G. Barnard, J. It is too late at the trial to object that the complaint and summons vary; that the summons was under the wrong subdivision of the 129th section of the code of procedure to justify the present complaint under it. That objection should have been presented by motion, in order that an amendment might have been made on just terms. If necessary to sustain the judgment, it would be now amended, so as to conform to the facts proved.

The facts on which the recovery is based are wholly undisputed. The deputy of the sheriff of the city and county of New York had, under and by virtue of executions issued and delivered to such sheriff, sold on the 13th of May, 1858, property of the defendants in the executions, to the amount of $516.95. This money he has kept, and not paid either to the sheriff or to any person who was entitled thereto. The defendant Perry is the surety of the deputy, and he, with the deputy and his co-surety, is sued by the sheriff upon the bond given by the deputy, conditioned that he would well and truly execute the office of deputy sheriff.

The defendants claim, first, that they are not liable because the sheriff was not sued to recover this sum until after three years from the time the money was made by the deputy, and that by section 92 of the code the action was barred by lapse

of time. It was a breach of the deputy's bond if he failed to pay money collected, even if the sheriff should never be sued or made to pay the amount. (*McClure* v. *Erwin*, 3 *Cowen*, 313.) The deputy's liability depends solely upon his own omission to pay the sheriff, and not in any manner upon what becomes of the money after the sheriff receives it, or who is entitled to it.

The law declares the judgment from undisputed facts. There was nothing for a jury to find.

The judgment should be affirmed, with costs.

LEONARD, J. concurred.

SUTHERLAND, J. I dissent. I am inclined to think that the evidence offered by the defendant, to show that Kilbreth had no interest in the money for which the furniture was sold, and was not entitled to receive any from Willet, and that Willet paid the money in his own wrong, was improperly ruled out. Moreover, after a careful examination of the case, I fail to see the ground upon which the judge was justified in directing a verdict for the plaintiff. Stewart swore that he never received the money from the auctioneer. The auctioneer swore that he had paid Stewart *a part*, without saying, or being asked, how much. How then could a verdict be directed on the ground that Stewart had received but had not paid over the money?

The recovery of the judgment against the sheriff, and the payment of it by the sheriff, is a mystery to me, and needs more explanation than the case furnishes.

Judgment affirmed.

[NEW YORK GENERAL TERM, November 7, 1864. *Leonard, Sutherland* and *Geo. G. Barnard*, Justices.]

43 102
44 666
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LEE and others *vs.* MARSH, receiver, &c.

A rail road corporation, as a common carrier of goods, can by contract exempt itself from all liability for the loss of, or an injury to, goods, from negligence.

The plaintiffs made an agreement with the defendant as receiver of the Erie rail road, for the transportation of live stock, over the road. The contract exonerated the defendant from all liability for loss or damage that might happen from any other cause than willful negligence or fraud; and stated that the rate of freight to be paid by the plaintiffs had been reduced in consequence of their assuming these risks. *Held* that the defendant was not liable for damages to the plaintiffs' cattle arising from the cars being thrown off the track, where it was found, by the referee, that the occurrence was without any willful negligence on the part of the defendant or his agents.

Where animals, transported by rail road, were killed, by an accident for which the company was not liable, and the agents of the company offered to carry the dead stock through, if the owner, who accompanied the train and was present at the accident, would take charge of them, who refused to do so; *Held* that the owners had no claim to recover of the rail road company, on the ground that they had failed to deliver the carcasses of the dead animals.

APPEAL from a judgment entered upon the report of a referee. The action was brought to recover damages for the breach of a contract made between the plaintiffs and the defendant, as receiver of the Erie rail road company, for the transportation by the latter, over the road, of a quantity of cattle and hogs. The agreement was as follows:

"New York and Erie rail road, Dunkirk station, Oct. 31, 1861. Memorandum of an agreement made and concluded this day, by and between the receiver of the New York and Erie Rail Road Company, Nathaniel Marsh, of the first part, by his station agent, at the above named station, and Lee and Elliott, of the second part, witnesseth: That whereas the said receiver of the New York and Erie Rail Road Company transports cattle, horses, pigs, hogs, sheep, lambs, calves, or other live stock, only at first class rates, as per tariff, excepting in the following cases, namely: Where the said receiver transports them at a reduced rate, in consideration

of the owner or shipper assuming certain risks, as specified below. Now, in consideration that the said receiver of the said rail road company will transport for us such live stock, at the reduced rate of fifty cents per 100 lbs., the said Lee and Elliott do hereby agree to take the risk of injuries which the animals, or either of them, may receive in consequence of any of them being wild, vicious, unruly, weak, escaping or maiming themselves, or each other, or from delays, or in consequence of heat, suffocation or other ill effects of being crowded, either upon the cars or barges of the company, or on account of being injured by the burning of hay or straw, or any other material used for feeding or bedding the stock, or in the train with the same, and for any damage occasioned thereby; and also all risk of any loss or damage which may be sustained by reason of any delay in such transportation, or by reason of the breaking of any rail or cars, or parts thereof, or that may happen from any other cause than the willful negligence or fraud of said receiver or his agents, and in no event shall the said Nathaniel Marsh be personally liable for loss or damage. And it is further agreed, that the said Lee and Elliott are to load, tranship and unload said stock at their own risk, the said receiver of the New York and Erie Rail Road Company furnishing the necessary laborers to assist. And this agreement further witnesseth, that the said Lee and Elliott have this day delivered to said receiver of the said rail road company, two car loads of cattle and hogs, to be transported to Bergen, on the conditions above expressed."

The referee found that this agreement was duly executed, at the time it bears date, by the plaintiffs and defendant, and that the said two car loads of cattle and hogs consisted of thirty-six head of beef cattle and sixty-six fat hogs, belonging to the plaintiffs; and that the said cattle and hogs, at the time of shipment, were in good order and condition, and were of about equal value and quality; that is, the cattle were of about equal value and quality one with another, and so were the hogs. That after said cattle and

hogs were shipped, the train in which they were shipped proceeded on its way until within forty-eight or fifty miles of New York, when, at about two and a half o'clock in the morning, an accident suddenly occurred to the train. The engine and tender were upset, and, with four or five cars, thrown off the track. The first four cars were badly smashed and broken up, and the fifth one injured. The plaintiffs' cattle and hogs were in the first two cars from the tender. One of the plaintiffs, Mr. John M. Lee, was on the train at the time, in charge of the plaintiffs' cattle and hogs. Fourteen of the plaintiffs' cattle and twenty-six of their hogs were instantly killed, or so badly injured that they died soon after the accident. The remaining twenty-two head of the plaintiffs' cattle, and forty of their hogs, were delivered at Bergen in a damaged condition. The accident was occasioned by a heavy rain storm, which had washed away the track. That there was negligence on the part of the defendant in running at full speed in such a night as that. But the referee did not find willful negligence. That after the accident the plaintiffs refused to take charge of any of the cattle or hogs except conditionally. The condition was that the plaintiffs were to take charge of them to Bergen, to do the best thing they could with them, and the defendant would take no advantage of that. The defendant proposed and agreed to that arrangement. The plaintiffs refused to take charge of the dead and dying cattle and hogs, and would have nothing to do with them. The plaintiffs paid to the defendant the full freight on all the cattle and hogs, without deduction for loss or damage by reason of the accident. The defendant exacted it before delivering the cattle and hogs brought. That if the cattle killed had been dressed immediately after the accident, and the meat, hides and tallow delivered with the other cattle, they would have been worth as much per head as the injured cattle that were delivered. The referee reported in favor of the plaintiffs for $1006.06.

D. B. Eaton, for the appellant.

A. Prentice, for the respondents.

LEONARD, P. J. The referee has found as a fact in this case that the defendant was guilty of negligence in running the train of freight cars, when the accident occurred, on a dark and stormy night, at the rate of fourteen miles an hour, and adds that such negligence was not willful. Nor does he find that it contributed to produce the accident.

The contract was for the transportation of live stock belonging to the plaintiffs, over the Erie rail road, which was operated by the defendant as receiver, and exonerated the defendant from all liability for loss or damage that might happen from any other cause than the willful negligence or fraud of the defendant or his agents. The contract also states that the rate of compensation to be paid by the plaintiffs has been reduced in consideration of their assuming these risks. It is evident, then, that, if the contract is valid, the defendant is not liable for the damage arising from the accident mentioned in the case, as the occurrence was without any willful negligence on the part of the defendant or his agents.

The referee has found, however, as his conclusion of law, that the law does not permit the defendant to restrict his liability, as a common carrier, for negligence. In this conclusion, he appears from the recent decisions to be in error. I think it must be considered as settled in this state, that common carriers may limit their liability for negligence in almost any respect by express contract, for such a consideration as will be satisfactory to the passenger or freighter, and that such contracts are not against public policy. (*Dorr* v. *The N. J. Steam Nav. Co.* 1 *Kern.* 485. *Wells* v. *The N. Y. Central R. R. Co.* 24 *N. Y. Rep.* 181. *Bissell* v. *The N. Y. Central R. R. Co.* 25 *id.* 442.)

The counsel for the plaintiffs insists that they are entitled

to recover, although the referee may be wrong in respect to the law and the reasons which he has given for his report in favor of the plaintiffs, because a part of the stock, although killed by the accident, was not delivered at its destination according to the contract. It appears that the animals which were killed by the accident had a marketable value, if immediately dressed, and the plaintiffs insist that the contract is broken by reason of the failure to deliver the carcasses. But who was to dress the animals and prepare them for market immediately? Certainly the defendant was under no such obligation. This attention was required in order to preserve any value in the dead animals, and overcome the loss which had apparently befallen the plaintiffs in consequence of the accident.

I am not prepared to assent, however, to the proposition that the defendant was liable to deliver the carcasses. The character of the freight was changed when the animals were dead. The defendant was bound to deliver the animals alive, unless relieved from so doing by some condition of his contract; and the delivery of their dead bodies would not relieve him from responsibility for the failure to deliver them alive, if the loss arose from causes not within the risks from which the plaintiffs had agreed to relieve the defendant. The agents of the defendant, it appears by the report, offered to carry the dead stock through, if one of the plaintiffs, who accompanied the train and was present at the accident, would take charge of them. The plaintiffs refused to take charge of, or have any thing to do with the dead and dying animals.

The plaintiffs have no claim to recover, on the ground so urged by their counsel.

The judgment should be reversed, and a new trial had before the same referee; the costs to abide the event.

SUTHERLAND, J. Not one of the cases cited by the counsel for the appellant, except *Wells* v. *The New York Central*

Rail Road Co. (24 *N. Y. Rep.* 181,) and *Bissell* v. *The New York Central Rail Road Co.* (25 *N. Y. Rep.* 442,) shows that even a common carrier of goods can by contract exempt himself, or itself, from liability for *negligence*. Not a case in the *New York Reports*, prior to *Wells* v. *The N. Y. Central Rail Road Co.*, and *Perkins* v. *The same company*, (24 *N. Y. Rep.* 196,) can be referred to, which, when carefully considered, can be said to decide, or establish, any such doctrine. But in the cases last mentioned, and also in *Bissell* v. *The N. Y. Central Rail Road Co.* (25 *N. Y. Rep.* 442,) it was held by the court of appeals that a rail road corporation can by contract exempt itself from all liability for an injury to a passenger from negligence. If so, *a fortiori*, a rail road corporation, as a common carrier of goods, can by contract exempt itself from all liability for the loss of, or an injury to, goods, from negligence. These decisions of the court of appeals, therefore, force me to concur with the presiding justice, in the conclusion that there must be a new trial in this case.

Geo. G. Barnard, J. also concurred.

New trial granted.

[New York General Term, November 7, 1864. *Leonard, Sutherland* and *Geo. G. Barnard*, Justices.]

In the matter of EDWARD PHILIPS, jun. an insolvent debtor.

The omission of judgment creditors, on signing a petition for the discharge of an insolvent debtor, to add to their signatures a declaration that they relinquish their judgments to the assignee to be appointed, does not deprive the judge of jurisdiction; but is a mere irregularity, which can be cured by attaching such relinquishments to the petition, afterwards.

CERTIORARI to remove proceedings for the discharge of an insolvent debtor.

SUTHERLAND, J. The *certiorari* in this case brings up for review only questions of jurisdiction, of regularity, and of law. (*Morewood* v. *Hollister*, 2 *Seld.* 309.)

The only question presented by the return appears to be one of jurisdiction. Certain of the petitioning creditors were judgment creditors, and did not, at the time of signing the petition, add to their signatures a declaration that they relinquished such judgments to the assignee to be appointed, though such relinquishments were subsequently, and before any further proceedings by the judge, obtained and attached to the petition. If the omission of these judgment creditors at the time of signing the petition was a mere irregularity, it was thus cured. *The Russell and Erwin Manu. Co.* v. *Armstrong*, (12 *Abb.* 472,) is a decision of the general term of this district, to the effect that this omission did not deprive the judge of jurisdiction, but was a mere irregularity.

The proceedings should be affirmed, with costs.

LEONARD, J. In the case of *Hurst*, (7 *Wend.* 240,) an amendment was allowed, specifying the consideration of several debts which had been omitted by the insolvent in the account of his creditors.

The amendment was held to be an answer to the objection that the original account was defective in this respect.

The amendment allowed in the case of Philips appears to be of a similar character.

The amendment in the present case, as in that of Hurst, cured an irregularity in a point not material to give the judge below jurisdiction over the case in its inception. Otherwise the amendment would have been within the principle decided in *Small* v. *Wheaton*, (4 *E. D. Smith*, 427.)

I concur with Judge Sutherland's conclusion.

Geo. G. Barnard, J. also concurred.

Proceedings affirmed.

[New York General Term, November 7, 1864. *Leonard, Geo. G. Barnard* and *Sutherland*, Justices.]

Van Valkenburgh *vs.* The Mayor &c. of the City of New York.

The legislature, by an act passed on the 17th of April, 1860, constituted certain persons, therein named, commissioners to locate and erect, in the city of New York, a suitable building to be used as a court house, &c. with power to purchase the necessary grounds for that purpose; declared that the grounds and buildings so to be purchased and erected should be the property of the city; and required the board of supervisors of the county to levy by tax an amount not exceeding $50,000, for the purpose specified. The commissioners entered into a contract, on behalf of the city, with the plaintiff, for the purchase of a lot of land on which to erect the court house.

Held, on demurrer, that in the absence of any acceptance of, or assent to, the act by the corporation of New York, the commissioners were not, by force of the act, the agents of the corporation, and had no power to bind the city by their contracts.

And that for the legislature to appoint agents to purchase property for the city, and at its expense, and without its consent, was an extraordinary assumption of power, to which the court could not assent.

APPEAL from a judgment ordered at a special term, allowing a demurrer to the complaint. The legislature passed, on the 17th day of April, 1860, an act constituting certain persons, therein particularly described, a board of commis-

sioners to locate and erect, in the city of New York, a suitable building to be used as a court house, &c. (*Laws of* 1860, *p.* 1003.) The commission was organized in May, 1860. On the 11th of June, 1860, the commissioners appointed James H. Welsh, —— Stewart, and Merwin N. Jones, to select a suitable location for the building mentioned in the act. On the 2d of July, 1860, the commissioners adopted the report of Mr. Jones, selecting the land described in the complaint as the site for said building. On the 14th of September, 1860, a contract was made and executed, between the plaintiff and the commissioners assuming to act in behalf of the city, for the sale by the plaintiff, and the purchase by the commissioners, of a lot of land on which to erect a building, for the sum of $6000. There was no allegation of any assent to the act, or acceptance thereof by the corporation. The plaintiff alleged a readiness to perform, on his part, and a tender of a deed to the defendants; and prayed for a specific performance of the contract.

The defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and had judgment on their demurrer, with costs, at special term.

The following opinion was given by the justice before whom the argument was had at the special term.

Clerke, J. "I think the plaintiff has mistaken his remedy by suing the defendants. Although the defendants are a public corporation, yet their rights of property are as sacred as those of a private corporation, or of a natural person. The legislature has no right to appoint persons to make contracts for the one, any more than for the other. The defendants had no agency in the purchase, or in the employment, as agents, of the commissioners. The latter entered into a contract with the plaintiff, for the purchase of the land, without the concurrence, or, as far as we know, even the knowledge of the defendants. The act of itself says nothing

of the liability of the corporation of the city of New York, for the land necessary for the contemplated building, but provides another mode of securing payment for it. So that even if the legislature have power to make contracts itself for the corporation, or to appoint agents to make contracts for it, this act would have created no liability against it.

The defendants should have judgment on the demurrer, with costs."

The plaintiff appealed to the general term.

James M. Smith, for the appellant. I. The legislature of a state is sovereign and supreme. It has just right and full power to do all that is not inconsistent with the restrictions placed upon it by the constitution of the state, or of the United States. Those who deny the right of the legislature to pass any particular act must *show the constitutional restriction on its power* to do so. It is not incumbent on those who claim under the act to show the power. This is presumed, until the contrary be shown. These are well settled principles of constitutional law. (*People* v. *Draper*, 25 *Barb.* 359. *S. C.* 15 *N. Y. Rep.* 543. *Rumsey* v. *People*, 19 *id.* 46.)

II. The doctrine that a charter is a contract, and that therefore the legislature may not change it so as to impair the obligation of a contract, has no reference to *municipal* corporations, created for governmental purposes. (*See* 2 *Kent*, 305.)

III. The *object* of this act was to provide for the selection, and if necessary, the purchase of land in the city, for the erection of a building for a public purpose. The city was not to be deprived of any of its property. And if the purchase from an individual was to be by virtue of the right of eminent domain, and on appraisal, the legislature had the right to delegate this power to the officers of a municipal corporation. (*Smith on Constitutional Law*, 414, 415.

Heyward v. *Mayor of New York*, 3 *Seld.* 314. *People* v. *Smith*, 21 *N. Y. Rep.* 595.)

IV. The agents selected, and the modes of procedure under the act, are, on general principles, entirely unexceptionable. Responsible and diversified officers are selected. The objects of the expenditure and its amount are carefully guarded. There is then no objection to this act on general principles of constitutional law, or in its objects and agencies. It results from these views, that those denying the validity of the act must show that it interferes with some vested rights of the city, which the legislature had no power to touch.

V. What, then, is there in the city charter forbidding the legislature to do what the act prescribes? It takes away no property. It does not lessen the proprietary interests of the city. It seeks to secure a public convenience. What principles of constitutional law are violated? (*See* 2 *Kent*, 305; 15 *N. Y. Rep.* 543.)

John E. Develin, for the respondents. I. The legislature has no power to make a contract, or to authorize others to make contracts, which shall be binding upon the defendants, without their consent. The defendants are an ancient corporation, very many years older than the government whose legislature, it is claimed, has created a debt against it; and are possessed of private property, which they hold and enjoy upon the same tenure upon which it would have been held and enjoyed in case it had been conferred upon a private individual. (*Donyan Charter*, §§ 6, 12. *Davies' Laws*, 151, 157. *Montgomerie Charter*, § 1. *Davies' Laws*, 165, 169. *Bailey* v. *Mayor*, 3 *Hill*, 531, 539. *Britton* v. *Mayor*, 21 *How.* 251. *Benson* v. *Mayor*, 10 *Barb.* 223.) As respects their private property, and its disposition, the defendants are as free from legislative control as is any private individual in the possession and enjoyment of his property. (*Hoffman's Treatise*, *pp.* 44, 73. *Valentine's Laws*, *p.* 1199. *Green* v. *Mayor*, 5 *Abb.* 505. *Atkins* v. *Randolph*, 31 *Verm.*

Rep. 226.) Having thus determined the nature and extent of the defendants' property, and the tenure upon which it is held, it now becomes material to inquire in what particular and to what extent the legislature have, by the act in question, invaded or violated the rights of the defendants. If the contract set forth in the complaint constitutes a valid and binding obligation against the defendants, then there has been created against them a debt of three thousand dollars. If that contract shall ever be merged in a judgment by the successful prosecution of this action, that judgment can be enforced by the sale of sufficient of the defendants' property to liquidate its amount, and the proceeds of such sales will be paid to the plaintiff. The act, therefore, creates a debt against the defendants without their assent, and in its practical effect transfers the private funds of the defendants to the plaintiff. In each of these particulars the act violates the natural and constitutional rights of the defendants. (*Hampshire* v. *Franklin*, 16 *Mass. Rep.* 83. *Inhabitants of Medford* v. *Learned*, *Id.* 216. *Atkins* v. *Randolph*, 31 *Verm. R.* 1, 226. *Pittsburgh and Steubenville R. R. Co.* v. *Gazzan*, 35 *Penn. Rep.* 340. *Constitution*, *art.* 1, § 6. *People* v. *Haws*, 37 *Barb.* 440.)

II. Conceding the power of the legislature to bind the defendants, by the contract which the commissioners should make in pursuance of the act, yet its intention that the corporation should not be so bound is evident, from the fact that the act itself provides another mode of paying for the land which the commissioners were authorized to purchase. (*Laws of* 1860, *p.* 1004, § 2.)

III. Admitting the liability of the defendants upon the contract made by the commissioners, still the complaint is defective. It does not allege the presentment of the claim to the comptroller for payment. (*Laws of* 1860, *p.* 645, § 2.) The complaint is also defective for the reason that it does not aver performance or tender of performance on the part of the plaintiff. (*Green* v. *Reynolds*, 2 *John.* 206. *Johnson* v.

Wygant, 11 *Wend.* 49. *Williams* v. *Healey*, 3 *Den.* 363 *Lester* v. *Jewett*, 1 *Kern.* 453.)

By the Court, GEO. G. BARNARD, J. The legislature of the state of New York (*Sess. L.* 1860, *ch.* 405, *p.* 1003) enacted that certain persons therein named be constituted a board of commissioners, "to locate and erect in the city of New York a suitable building to be used as a court house and place of detention of persons brought to the police court in said district," and "the ground and buildings so to be purchased and erected shall be the property of the city of New York."

It is also, by the act, provided that the board of supervisors of the county of New York shall levy by tax, an amount not exceeding $50,000. Under this act the commissioners have selected and agreed to buy of the plaintiff, for and on behalf of the city, the lands described in the complaint. The city refuses to accept the deed, and the plaintiff brings this action against the corporate authorities, to compel a specific performance of the contract. The defendant, by demurrer, presents this question: Are the defendants liable for the acts of this commission?

If these commisioners are, by force of the act, agents of the city, then this demurrer is not well taken, and the plaintiff is entitled to judgment.

The first case in our courts which I find, bearing upon this question, is *Appleton* v. *The Water Commissioners of New York*, (2 *Hill*, 432.) These commissioners were appointed by the governor and senate to construct the Croton aqueduct, for the benefit and at the expense of the city of New York. It was held that the water commissioners were not liable, and that the remedy was against the city. The reasons for this judgment are not given.

In *Clark* v. *The Mayor &c. of New York*, (4 *Comst.* 338,) it was decided that the judgment for work done under a contract with the Croton water commissioners, against the Mayor,

be reversed for errors on the trial, and the question of the defendant's liability was not noticed.

In the case of *Bailey and others* v. *The Mayor &c. of New York*, (3 *Hill*, 531,) it was distinctly adjudged that the water commissioners were the agents of the city, but upon the ground that by the terms of the water commissioners' act the city had the power to accept the charter or reject it, and the common council did by resolution accept it—Mr. Justice Nelson using this language: "The acceptance was entirely voluntary; for the state could not enforce the grant upon the defendants, against their will. This would be so on general principles, (*Angell & Ames on Corporations*, 46, 50, *and cases cited;*) but here the *charter itself* left it optional with the common council to accept or not."

This last case went to the court of errors, (*The Mayor &c. of New York* v. *Bailey*, 2 *Denio*, 433,) and was affirmed; one senator only—Senator Barlow—holding the broad principle that the act of itself made the commissioners agents of the city.

I think, therefore, that the cases fail to establish the agency of the commissioners for the defendant in this case, where there was no acceptance of the act by the defendant.

It requires clear authority to warrant this claim. An agent established by law to purchase property for the defendant and at its expense and without its consent, is an extraordinary assumption of power. I can not yet assent to it.

Judgment affirmed with costs.

[New York General Term, November 7, 1864. *Leonard, Sutherland* and *Geo. G. Barnard*, Justices.]

43 116
43c 69

THE PEOPLE, *ex rel.* Simpson, *vs.* PLATT, landlord &c.

An affidavit of the service of a summons, under the statute relative to "Summary proceedings to recover the possession of land," which alleges a service upon an under tenant, on the demised premises, and that the tenant was absent from his last and usual residence, without stating that such residence was upon the demised premises, is insufficient.

A demand of the rent claimed to be due, made of an under tenant, who is described in the affidavit as a person in possession of the demised premises, is not sufficient to give the justice jurisdiction.

The demand must be made of the tenant, or three days' notice requiring payment, or the possession of the premises, must be served in the manner specified in the statute for the service of the summons.

CERTIORARI to review proceedings had before one of the justices of the district court of the city of New York, under the statute relative to "Summary proceedings to recover the possession of land." The grounds of objection to the proceedings are stated in the opinion of the court.

By the Court, LEONARD, P. J. The proof is insufficient, in respect both to the service of the summons, and the demand of the rent claimed to be due.

1. The summons was served on an under tenant, upon the demised premises, and the affidavit states that the tenant was absent from his last and usual residence. The statute requires, where the summons is not served on the tenant, that the service be by leaving a copy with a person of mature age residing at the last and usual residence of the tenant: and such service can be made only in case of absence of the tenant from such residence. If no such person can be found there, the service can be made by affixing a copy of the summons in a conspicuous place on the demised premises. (2 *R. S.* 514, § 32.) The service was not made in conformity with either of the modes directed by the statute. The affidavit indicates that the tenant was absent from his residence, but it does not state that such residence was upon the demised premises. It is only in that case that the summons could

have been properly served on some person other than the tenant; even if we assume that the person served, in this case, was of mature age, which is a fact not stated in the affidavit.

2. The demand stated in the affidavit of the landlord does not conform to the statutory requirements. It was made of the same under tenant upon whom the summons was served, who is described as a person in possession of the demised premises.

The demand must be made of the tenant, or three days' notice requiring payment or the possession of the premises must be served in the manner indicated for the service of the summons. (2 *R. S.* 513, § 28.)

The justice had no jurisdiction, in consequence of these defects.

The proceedings must be reversed, with costs, as to Simpson and Baker, and those persons restored to the possession.

New York General Term, November 7, 1864. *Leonard, Geo. G. Barnard* and *Sutherland*, Justices.]

43 117
43a 244

Hamilton *vs.* Van Rensselaer.

A surety, who guaranties the punctual payment of "the interest" on a money bond not bearing interest by its terms, is liable for interest accruing after the bond becomes due.

CONTROVERSY submitted by the parties, without suit, upon the following state of facts: On and before the 1st day of July, 1854, William D. Waddington and two other persons were jointly and severally indebted to George L. Schuyler, trustee, &c. in the sum of $10,000; and it was then mutually agreed between the said Waddington and the said Schuyler, that he, the said Schuyler, should release the said Waddington from his joint liability, and accept from

him, in liquidation of his indebtedness, the bond and guaranty hereinafter set forth. That on the said 1st day of July, 1854, the said William D. Waddington made and executed, in pursuance of said agreement, under his hand and seal, and delivered to the said George L. Schuyler, trustee as aforesaid, his certain bond or obligation, in writing, whereby he, the said William D. Waddington, his heirs, executors and administrators, became held and firmly bound unto the said George L. Schuyler, trustee as aforesaid, his successors or assigns, in the penal sum of $7000, upon the following conditions, to wit: That if the said William D. Waddington, his heirs, executors or administrators, should well and truly pay, or cause to be paid, unto the said George L. Schuyler, trustee as aforesaid, his successors or assigns, the just and full sum of $3333.33 on the 31st day of January, 1861, together with interest thereon, at and after the rate of seven per cent per annum, payable on the 1st day of January, 1855, and half yearly thereafter, then the above mentioned obligation should be void, otherwise to remain of full force and virtue. That, simultaneously with the execution of the said bond, Jeremiah Van Rensselaer, the defendant, named his certain guaranty of the punctual payment of the interest on the said bond, indorsed thereon in the following words, to wit; "For value received, I guarantee the punctual payment of the interest on the within bond, and will pay the interest on demand, in default of its payment by Mr. Waddington. Signed, Jer. Van Rensselaer"—and without which said guaranty the said bond would not have been accepted, nor would the consideration and advantages for which said bond was given, have been granted and parted with by said Schuyler. And the said bond was delivered and accepted, with said guaranty indorsed thereon, according to the agreement between said Schuyler and Waddington. That on or about the 15th day of March, 1856, the said George L. Schuyler, trustee as aforesaid, for value received, duly assigned and set over unto the plaintiff, Mary M. Hamilton,

all his right, title and interest, in and to the said bond and guaranty, with all arrearages of interest thereon, which said bond is still due and unpaid, and no extension of time has been given to the said William D. Waddington, or to any other person. That the interest on the said bond has not been paid since the 1st day of July, 1860, although payment thereof has been demanded, both of the said William D. Waddington and of the defendant, and refused by them, except that the defendant has tendered to the plaintiff the sum of $136.11, being the amount of interest due on the said bond till the 31st day of January, 1861, and the defendant is ready and willing to pay the said sum of $136.11 to the plaintiff, or to pay it into court. The plaintiff claims that the defendant is liable for the payment of the interest on the said bond from the 1st day of July, 1860, till the 31st day of January, 1863, making in the aggregate the sum of $583.33, with interest thereon from the 1st day of January, 1863. The defendant claims that he is liable only for the sum of $136.11, being the interest on the said bond from the 1st day of July, 1860, till the 31st day of January, 1861, when the said bond became due and payable.

The parties hereto mutually prayed the judgment of the court on this statement of facts.

Samuel E. Lyon, for the plaintiff. I. The bond was by its terms to continue in full force and virtue, if not paid at maturity. After it became due it was, if not paid, as much a bond as before. When, therefore, the guarantor took the responsibility of securing the payment of the interest, he took the risk of paying the interest which accrued after the bond became due in case the principal thereof was not paid.

II. Guaranties are to be liberally construed. If the guarantor wished to restrict his liability to the payment of interest which accrued before the bond became due, he should have done so in express terms. Having failed to restrict his

liability, the words of the guaranty are to have their most extensive meaning; *i. e.* to be construed strongly against the guarantor, and liberally in favor of the plaintiff. (*Drummond* v. *Prestman*, 12 *Wheat.* 515. *Douglas* v. *Reynolds*, 7 *Peters*, 113, 122. *Lawrence* v. *McCalmont*, 2 *How.* 426. *Bell* v. *Bruen*, 1 *id.* 169, 186. *Dobbin* v. *Bradley*, 17 *Wend.* 422. *Fellows* v. *Prentiss*, 3 *Denio*, 518. *Gates* v. *McKee*, 3 *Kern.* 232. *Ridge* v. *Judson*, 24 *N. Y. Rep.* 64.)

III. By the facts, as submitted, Schuyler released two persons jointly liable as principals, with Mr. Waddington, and accepted instead of their joint liability the bond of Waddington, with the guaranty of the defendant. Such guaranty would not have been accepted but from the consideration that the interest would be promptly paid so long as the principal remained unpaid.

IV. The objection that the guarantor would be liable for an indefinite period, if the plaintiff's theory be correct, is inadmissible, for the guarantor might have restricted his liability, if he had chosen to do so. Not having done so, the words of the guaranty must be construed against him as strongly as the case will admit. (*Drummond* v. *Prestman*, *supra.*)

V. It being admitted by the stipulation annexed to the case, that there are no laches on the part of the holder of the bond, the only question before the court is, as to the extent of the liability of the guarantor upon the contract of guaranty. The words "value received" in the contract, express a sufficient consideration. (19 *Wend.* 557. 24 *id.* 35.) If it be admitted, as it must be, that the principal is liable for the interest on the bond until it is paid, the case leaves no room for argument; because—1st. The contract of the surety is "For value received, I *guarantee* the punctual payment of the *interest* on the within bond, and will *pay the interest* on demand in default of its payment by Waddington;" and, 2d. The rule of law, as is well stated in 1 *Parsons on Con-*

tracts, 593, is, that "the liability of the guarantor is *coextensive* with that of the principal, *unless it be expressly limited.*' Hence, as there is no limitation in the guaranty upon th subject of interest, if Van Rensselaer's liability is coexten sive with that of Waddington, and Waddington is liable for the interest till the bond is paid, it seems to follow as a logical consequence that Van Rensselaer is liable to the same extent.

VI. The plaintiff is entitled to, and should have, judgment for the whole amount claimed by her, viz. $583.33, with interest from the 1st day of January, 1863.

R. M. Harison and *G. D. L. Harison*, for the defendant. I. The contract of guaranty must be strictly construed, and in no event can be extended beyond the fair import of its actual terms. It is *strictissimi juris.* (*Miller* v. *Stewart*, 9 *Wheat.* 680. *United States* v. *Kilpatrick*, *Id.* 720. *Walsh* v. *Bailie*, 10 *John.* 180. *Wright* v. *Johnson*, 8 *Wend.* 512. *Bigelow* v. *Benton*, 14 *Barb.* 123.)

II. The guaranty in this case was of "the punctual payment of the interest on the bond." By a consideration of these terms, the meaning of the agreement may be readily ascertained. 1. The words, "the interest on the bond," clearly point to a certain and definite amount of interest, which was payable in any event, according to the condition of the bond, namely, interest at seven per cent, from July 1, 1854, to January 31, 1861. 2. The words "punctual payment" limit the guaranty to such interest as was to be paid on certain specified days. Interest upon a debt that is overdue accrues daily, so as to daily increase the indebtedness, but it is not *payable* at all without the principal. The creditor may refuse to accept a payment of interest only, and retain unimpaired his right of action for principal and interest together.

III. Interest to January 31st, 1861, was the only interest

which the obligor in the bond *agreed to pay*, and this only was the interest upon the bond mentioned in the guaranty. Interest from the time when the bond became due may be recovered against the obligor, but only as *damages*, given by the law, for the breach of his agreement to pay the principal debt, not as *interest* accruing by contract. (*Watkins* v. *Morgan*, 6 *Car. & P.* 661.) 1. Damages are a mere incident of the principal, and can not be separated from it. Hence the receipt of the principal is a waiver of all claims for damages. (*Dixon* v. *Parkes*, 2 *Esp. C.* 110. *Tillotson* v. *Preston*, 3 *John.* 229. *Johnston* v. *Brannan*, 5 *id.* 268. *Stevens* v. *Barringer*, 13 *Wend.* 639. *Jacot* v. *Emmett*, 11 *Paige*, 142.) But the rule is different as to interest for the period before the principal becomes due, because there is an express agreement to pay such interest, which agreement is not satisfied by the payment of the principal. (*Fake* v. *Eddy's Ex'r*, 15 *Wend.* 76.) 2. Interest after the principal is due is frequently recoverable at a different rate from that stipulated in the contract. Thus, a bank prohibited by its charter from taking interest upon loans and discounts at a higher rate than 6 per cent, may recover interest at 7 per cent upon a note, from the time it falls due. (*United States Bank* v. *Chapin*, 9 *Wend.* 471.) And although the rate of interest reserved in a mortgage be but 5 per cent, the full legal rate is allowable after default. (*Bell* v. *Mayor &c. of New York*, 10 *Paige*, 49.) Interest, in the nature of damages, is computed according to the *lex fori*, not according to the *lex loci contractus*. (*Ives* v. *Farmers' Bank*, 2 *Allen's Mass. Rep.* 239. *Barringer* v. *King*, 5 *Gray*, 12. *Easton* v. *Mellus*, 7 *id.* 580.) As, therefore, it appears that such interest is not governed by, it can not be founded on, the agreement of the parties. But the collateral agreement of the guarantor, for the payment of interest, can not be subjected to a wider construction than the original agreement of the principal debtor, for the payment of interest; there-

fore, as the principal debtor agreed to pay interest until the 31st of January, 1861, only, the defendant is not liable for the interest which has accrued since that time.

IV. The construction of the defendant's agreement, claimed by the plaintiff, imposes upon the defendant an obligation scarcely less onerous than if he had guarantied the whole debt; but it is evident that he had no intention of assuming any such responsibility. For the forbearance which his credit obtained he agreed to pay, which was all that could reasonably be asked of him. At the end of the term of credit the plaintiff was in the same position as her assignor before it was given, having her action against the original debtor for the debt; but the defendant was not liable for it, nor for damages for its detention.

V. The plaintiff's claim for interest upon interest is clearly untenable. If allowable, it could only be from the time when a demand for the payment of the interest was made upon the defendant. Hence, as no such demand was made, the defendant's tender of the amount of interest from July 1, 1860, to January 21, 1861, was sufficient.

By the Court, Geo. G. Barnard, J. I think the defendant liable to pay the interest which has accrued upon the bond since it became, by its terms, due. He agreed by his written promise to pay "the interest on the written bond." There was no interest upon it when he covenanted to pay. It was, then, the interest which was to accrue. If the bond had been payable instantly, there would be no question of the defendant's liability. Why limit the liability where it had a term of credit contained in the bond? The guaranty makes no such limitation. Would it not be interest if the bond was due? Is it not interest after the bond becomes due? The party has not limited his liability, and the court can not, if he omits to do it. His interest can not be inferred or declared from the burden his unrestricted words put upon him.

I think the plaintiff entitled to judgment for simple interest only. The principal debtor can not be made to pay more, and the surety is only to make good his default.

Judgment accordingly.

[New York General Term. November 7, 1864. *Leonard, Sutherland* and *Geo. G. Barnard*, Justices.]

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White *vs.* Story, administrator, &c.

The power of a surrogate to refer a matter in controversy, arising out of a claim presented to an executor or administrator, against the estate, under title 3, part 2, chapter 6, sec. 34 of the revised statutes, embraces both legal and equitable claims.

In order to charge the separate estate of a married woman with a debt, prior to the act of 1860, there must have been an intention to charge the same, stated in the contract itself, or the consideration must have been one going to the direct benefit of the separate estate. Sutherland, J. dissented.

The subsequent promise of the married woman to pay the debt, out of her separate estate, will not supply the defect of proof in the original contract.

The furnishing of a supper, on the occasion of her daughter's marriage, will not be deemed a consideration going to the direct benefit of the separate estate.

APPEAL from a judgment entered upon the report of a referee. The case originated in an order of reference entered upon an agreement, dated November 4th, 1862, (approved by the surrogate,) to refer to Philo T. Ruggles, Esq. a matter in controversy, arising out of a claim presented to the defendant, as administrator of Maria J. Boerum, deceased, under the provisions of 2 *R. S.* 88, § 36. There were no pleadings, and the claim was for the "amount of a bill, as per contract, for wedding party, four hundred and eighty-nine dollars and thirty-seven cents" and interest. The cause was tried before the referee in the fall of 1863 and early part of 1864. His report is dated February 18th, 1864, whereby

he found in favor of the plaintiff, that in the fall of 1859 the plaintiff, at the request of Mrs. Boerum, furnished, sold and delivered to her goods, wares, &c. of the value of four hundred and eighty-nine dollars and thirty-seven cents, for an entertainment given by her on the occasion of the marriage of her daughter; that they were furnished on her personal order, and she repeatedly promised to pay for them out of her separate estate; that she had such separate estate, and the plaintiff knew it; that her husband, Jacob B. Boerum, was insolvent at the time, and the plaintiff knew it; that the articles were charged by the plaintiff to her, and that they were in accordance with her sphere in life. He found, as matter of law, that the plaintiff was entitled to recover against the defendant, as administrator, the amount claimed, with interest. Upon the report, judgment was entered March 11, 1864, for six hundred and sixty-nine dollars and sixty-five cents, from which the defendant appealed to the general term of this court, upon his exceptions to the report filed and served, and also upon his exceptions taken on the trial, and presented in the case; first, to admissions of testimony, and second, to the refusal of the referee to nonsuit the plaintiff.

Robinson & Scribner, for the appellant. I. The referee erred in allowing the plaintiff to answer the question, "In the furnishing of this supper, what acts did Mrs. Boerum do?" He was allowed to give evidence against the administrator, in respect to a transaction had personally between the deceased and the witness. The question propounded has reference to matters as to which he is asked to speak as a witness of them, and to what took place in a transaction between the deceased and the plaintiff, (the principal,) in reference to her procuring the goods to be furnished by him.

II. When the testimony on the part of the plaintiff had been concluded, the motion made to dismiss the case, or grant a nonsuit, ought to have been granted. 1. Mrs. Boerum

being (in the fall of 1859, when these goods were contracted for) a married woman, residing with her husband, had no power to contract a *debt* which would charge her personally. (*Coon* v. *Brook*, 21 *Barb.* 546. *Bass* v. *Bean*, 16 *How.* 93. *Arnold* v. *Ringold*, *Id.* 158. *Andriot* v. *Lawrence*, 33 *Barb* 142.) 2. The orders of the wife, in the departments of her husband's household which she has under her control, are to be implied in law, and presumed in fact, as within her agency on her husband's behalf, and bind him. In this case the goods were delivered to the husband, and he was present at the entertainment. (*Switzer* v. *Valentine*, 4 *Duer*, 96. *S. C.* 10 *How. Pr. R.* 109. *Freestone* v. *Butcher*, 9 *Car. & P.* 643. *Lane* v. *Ironmonger*, 13 *Mee. & W.* 368.) The husband is equally liable, although the goods are charged on the tradesman's books to the wife. (*Furlong* v. *Hysom*, 35 *Maine Rep.* 332.) 3. The debt was not contracted for the benefit of Mrs. Boerum's separate estate; nor did she create any charge upon it for the payment of the debt. (*Yale* v. *Dederer*, 22 *N. Y. Rep.* 450. *Owen* v. *Cawley*, 36 *Barb.* 52. *Ledlie* v. *Vroman*, 41 *id.* 109.) 4. A suit against the estate of Mrs. Boerum could only be maintained as an action *in rem*, brought to charge some specific property, and not *in personam*. (*Dickerman* v. *Abrahams*, 21 *Barb.* 551. *Sexton* v. *Fleet*, 15 *How. Pr. R.* 106. *See authorities cited in Voorhies' Code*, [*7th ed.*] *p.* 173.) 5. No such remedy could be afforded on a demand at law, referred out of the surrogate's court. Claims of an equitable character are not within the cognizance of that court, nor can claims out of that court be recovered on such a reference, when it is made to appear that they are purely equitable.

III. If the court conclude there is error in the judgment, for any of the reasons stated in the last point, the judgment should be reversed, and judgment ordered for the defendant, with costs; but if not, then the judgment should be reversed and a new trial ordered, with costs to abide the event, for the error suggested in the first point.

A. R. Dyett, for the respondent. I. The goods furnished being in accordance with the wife's sphere in life, and consisting mostly of the necessaries of life, such as bread, meats, &c., *and going directly to her and her children's benefit*, should be a charge upon her separate estate, even if there was no avowed intent so to charge her separate estate. If the rent of a house occupied by her and her family would be a charge upon her separate estate, (*Taylor* v. *Glenny*, 22 *How. Pr. Rep.* 240,) then these necessaries of life furnished to her, on her own order, to her and her family, are a charge upon her separate estate. The charge grows out of the beneficial nature of the contract to her individually. (*Id. per Leonard, J.*) If the doctrine there held is true as to rent due, do not bread, butter, meats &c., furnished Mrs. Boerum for her and her family, charged to her at the time, promised repeatedly to be paid by her out of her separate estate, admitted to have been incurred by her, go to her own direct benefit?

II. It has always been held, that where a debt has been contracted by a *feme covert*, this will be *prima facie* evidence of an appointment, or appropriation of her separate estate, to the payment of the debt. (*Vanderheyden* v. *Mallory*, 1 *Comst.* 458.) All the early and recent cases, both in this country and England, establish the doctrine that where a *feme covert* holds separate property and obtains credit, the property is held liable without any special appointment. (1 *Comst.* 458. 7 *Paige*, 7, 112. 22 *Wend.* 526; *and other cases referred to in* 1 *Comstock.*)

III. The separate estate of a married woman would be held liable for her debt, where, in the contracting of the debt, there was an intention to charge her estate, *or where the consideration of the contract goes to her individual benefit.* The intent to charge the separate estate may be expressed in the contract, or inferred from the direct benefit to the estate. (22 *How.* 12.) And in the same case the court also held "that services rendered the wife for the benefit of her estate, though profitless, would be a charge upon her

estate." In *Yale* v. *Dederer*, (22 *N. Y. Rep.* 450,) the estate of the married woman was exempted, because, in the contract, there was no expressed intention to charge the separate estate, neither did the consideration go to her individual benefit, or to the benefit of her estate. In a similar case to *Yale* v. *Dederer*, (upon a wife's note,) (*Francis* v. *Ross*, 17 *How. Pr. Rep.* 561,) the note was recovered out of her separate estate, because it was given with the intent to charge it. (*See also per Hilton, J. in Francis & Becke* v. *Ross*, 17 *How.* 554.) The same rule of law and construction of *Yale* v. *Dederer* was held at general term, 1st district, in *Ledeliey* v. *Powers*, 39 *Barb.* 555.) In this case the intestate promised to pay the debt out of her separate estate, and the referee has found as a fact that she so promised. There can be no more conclusive evidence of an intent to charge that estate.

IV. The referee's findings of fact are such as to bring this case wholly within the cases cited; and the "appellate court can not interfere with referees' findings of fact, unless clearly against the weight of evidence, or in direct violation of some rule of law." (*Roberts* v. *Carter*, 28 *Barb.* 465. *Davis* v. *Allen*, 3 *Comstock*, 168. *Murfey* v. *Brace*, 23 *Barb.* 561.)

V. As to the third and fourth objections by the defendant to the plaintiff's recovery, we have only to say, that if it were true, that during the life of Mrs. Boerum an action like a bill in equity might have been necessary, which we by no means concede, since the passage of the acts of March 20, 1860, and April, 1862, (*Laws of* 1860, *ch.* 90, § 7, *and Laws of* 1862, *ch.* 172, § 7,) after her death, no such necessity exists. In every case all the debts of an intestate are liens upon his or her goods, chattels and credits, and the surrogate in all cases enforces these liens, by the application of the property to the payment of the debts, and this without distinction between legal and equitable demands.

BARNARD, J. This appeal presents two questions: *First.* Is the claim made against the administrator one which could be referred under title 3, part 2, chapter 6, section 34 of the revised statutes? The statute is very comprehensive; it authorizes the reference to be made of any disputed "claim" against the estate of any deceased person. It does not exclude equitable claims. It does not limit the reference to legal claims. The supreme court, at general term in the second district, have decided in an important case, (*Ackemon* v. *Congdon, ex'r &c. of Ackemon, deceased,*) that the power to refer under this statute covers both legal and equitable claims against a deceased person.

Second. Is the evidence sufficient to sustain the judgment? It is needless to go into a full examination of the American and English cases on the subject of charging the separate estates of married women. They are very conflicting as to the principle stated, and on the reasoning by which they are supported.

The court of appeals have in a late case established that, in order to charge the separate estate of a married woman, there must have been an intention to charge the separate estate stated in the contract itself, or the consideration must be one going to the direct benefit of the estate. (*Yale* v. *Dederer*, 22 *N. Y. Rep.* 450.)

The case shows no evidence that the deceased contracted this debt with the intention to charge her separate estate stated in the contract.

The vital fact necessary to charge her separate estate is wanting. Her subsequent promise to pay the debt out of her separate estate does not supply the defect of proof in the original contract. From the evidence given, she was never liable at all. She must have done enough to charge her separate estate at the time of the contracting of the debt, and in the contract, or there is no action against her, unless the consideration went to the benefit of the estate directly.

Does it? Did the furnishing of this supper tend in that direction? It is claimed that, because it went directly to her and her children's benefit, it should be charged on her estate. The rule requires a direct benefit to the estate itself.

I think that the evidence is insufficient to charge the defendant's estate, and the judgment should be reversed and a new trial granted, with costs to abide the event.

LEONARD, J. concurred.

SUTHERLAND, J. I can not concur. In my opinion, the evidence and the facts found by the referee would have abundantly sustained an action, in the lifetime of Mrs. Boerum, to charge her separate estate with the payment of the debt, and, considering the judgment in this case to be payable or collectable only out of such portion of the separate estate of Mrs. Boerum as may be in the hands of the defendant as her administrator, I think the judgment is right and should be affirmed. The rule or principle as to the liability of the separate estates of married women, stated in the opinion of Justice Barnard, is, in my opinion, much too limited.

New trial granted.

[NEW YORK GENERAL TERM, November 7, 1864. *Leonard, Sutherland* and *Geo. G. Barnard*, Justices.]

43 131
12 549

DYCKMAN *vs.* VALIENTE, and others.

The plaintiff and several other persons, including some of the defendants, organized a steamship company, by filing a certificate under the general law for incorporating steamship companies, and subscribing for the stock, applying the capital paid in to the building of a ship to carry freight and passengers between New York and Cuba. Subsequently, a majority of the stockholders united together, as it was alleged, to frustrate the plan on which the ship was built, and to deprive the plaintiff of his rights. And some of the defendants, refusing to recognize the corporation so formed, and claiming the sole ownership of the ship, mortgaged her to M. They then organized a new company, by a different name, and caused the ship to be registered as belonging to the latter company, and to which company they conveyed the ship, and the new company was about to issue stock to the defendants, to the exclusion of the plaintiff, for the value of the ship. It was alleged, and offered to be proved, that the defendants had sold the ship, to the government, and retained the proceeds.

Held, that the questions of tenancy in common, or of joint tenancy, or of part ownership, were not in the case; but that the plaintiff, as a *stockholder* of the first corporation, was entitled to equitable relief, at least as against those of the defendants who were officers or stockholders of that corporation, and who participated in the acts charged in the complaint, and the necessary effect of which was the destruction of his rights as such stockholder.

Held, also, that the plaintiff's complaint could not have been rightfully dismissed, even regarding him as a mere *creditor* of the first corporation.

Held, per LEONARD, J., That the plaintiff was *prima facie* entitled, as a *partner*, to an accounting from his fellow stockholders, as partners, for the value of the partnership property converted by them, and from which he was excluded.

THIS action was tried at a special term before a justice of this court, who, at the close of the plaintiff's testimony, dismissed the complaint. From the judgment thereon entered the plaintiff appealed. The complaint sets forth, that the defendant Joaquin Baralt, in behalf of himself and others, defendants in this action, in the year 1860 proposed to the plaintiff to organize a steamship company, to carry freight and passengers between New York and Cuba; that for the purpose of carrying out the project, it was agreed that the plaintiff should, in his own name, contract with the firm of Boardman, Holbrook & Co. for the building of a steamship

by them; that the company should thereupon be organized, and the steamship, when completed, should be conveyed to the company. That in pursuance thereof, the plaintiff, on the 15th of September, 1861, made the contract with Boardman, Holbrook & Co. for building the ship, which was to cost $120,000. That Boardman, Holbrook & Co. made a sub-contract with Jeremiah Simonson to build the hull of the ship, for the sum of $51,000, the performance of which sub-contract by Boardman, Holbrook & Co. the plaintiff guarantied. That in pursuance of the foregoing, the plaintiff and Baralt, Boardman, Holbrook and others organized "The New York and St. Jago Steamship Company," by filing, on 1st of October, 1860, a certificate under the general law for incorporating steamship companies; that to complete the organization of this company, a subscription list of the stock of said company was subscribed by the plaintiff, by the firm of Valiente & Co., (composed of the said defendant Baralt and the two defendants Valiente,) the said firm of Boardman, Holbrook & Co., and by the said Baralt as attorney for numerous other parties residing in Cuba; a copy of the subscription list was annexed, by which it appeared that Boardman, Holbrook & Co. subscribed for $20,000 of the stock; Valiente & Co. $30,000; W. H. Dyckman, the plaintiff, $13,000; that all the subscribers excepting the plaintiff and Boardman, Holbrook & Co. resided in Cuba. That during the building of the steamship the plaintiff received from the firm of Valiente & Co. various remittances of money, for themselves and the other subscribers, on account of their subscriptions, all of which the plaintiff paid over to Boardman, Holbrook & Co., on account of the contract for building the ship; that the plaintiff paid to Boardman, Holbrook & Co., of his own money, $3250 on account of the plaintiff's subscription to the stock in said company, and his interest as part owner in said ship; that the plaintiff has also disbursed and paid out in and about the construction of the ship, and in and about *the affairs of the company*,

$1348.95; that by virtue of such payment the plaintiff is part owner in said ship, and *entitled* to an interest proportioned to the amount of these payments. That the plaintiff has contributed to the capital of the company less than the amount of his said subscription, which has been assented to by Baralt and the other subscribers. That the ship is now completed, and called the *Santiago de Cuba;* that some amount is due and unpaid, both to Boardman, Holbrook & Co. and to Simonson, on account of the building contract. That the defendants in this action have united together to frustrate the plan on which the ship was built, and to deprive the plaintiff of his rights, and they refuse to recognize the New York and St. Jago Steamship Company. That Baralt and the firm of Boardman, Holbrook & Co., claiming ownership in the whole ship, on the 15th June, 1861, mortgaged the same to the defendant Juan C. de Mier, to secure $35,000, alleged to have been loaned by De Mier to Baralt. That the defendants have caused the ship to be registered in the name of "The Cuba and New York Steamship Company," a new company which the defendants have organized, and to which they conveyed, or caused to be conveyed, the ship. That this company are about to issue stock to Baralt and his confederates, to the exclusion of the plaintiff, for the value of the ship. That the ship is worth much more than her cost. That the defendants De Mier, Baralt and Boardman are about to remove the ship to Cuba. The complaint prays that an account may be taken of the cost of the ship, and of the various contributions thereto; that the plaintiff's rights may be *ascertained and declared;* that the ship may be conveyed to the company first organized; or, that the ship may be sold, and its proceeds distributed. And also prays for other and further relief. The defendants in this action consist, (1.) Of the subscribers to the stock of the corporation organized by the plaintiff, including Baralt and Boardman, Holbrook & Co. (2.) Juan C. De Mier, the said mortgagee of the ship. (3.) The Cuba and New York Steamship Com-

pany, which is the new company organized by the defendants. (4.) One Joseph Belknap, connected with the organization of the last company. All the subscribers to the first company, "The New York and St. Jago Steamship Company," excepting Boardman, Holbrook & Co., put in a joint answer, sworn to by Baralt, in which they deny that the plaintiff paid Boardman, Holbrook & Co. $3500 on account of his subscription to the stock, but they say the plaintiff has always claimed to be a creditor of the ship, and her owners, for this sum, and the said sum of $1348.95. They deny that the plaintiff is a part owner of the ship, or entitled to an interest in it. They deny that Baralt, or any one, assented to a diminution of the plaintiff's subscription, but that the plaintiff violated his agreement in that respect. They deny that there is any thing due to Simonson. They put in issue the payment to Boardman, Holbrook & Co. by the plaintiff of all sums received by him from Valiente & Co. and others. They deny that they have united together to frustrate the original plan, but say that the plaintiff has, and that he has refused to pay over any part of his subscription, claiming that the moneys advanced by him constitute a debt due by the owners of the ship, and he has thereby compelled the defendants to organize the new company, which company now holds the title to the ship, and is the true and lawful owner thereof. Boardman and Holbrook put in a joint answer, exactly like the foregoing. These two answers put in issue but two facts, viz., whether the plaintiff had paid over all the moneys received from Valiente & Co., and whether the plaintiff's diminution to his subscription was assented to. All other substantial facts in the complaint are admitted by this answer. The defendant De Mier put in an answer admitting the mortgage executed to him; that the defendants have caused the ship to be registered in the name of, and conveyed to the Cuba and New York Steamship Company. He admits that he, Baralt, and Boardman are about to remove the ship to Cuba; he denies that stock in the new

company has been issued to Baralt and his confederates; he denies that any thing is due to Simonson; that the plaintiff has, or ever had, any interest in the ship and stock of the company, and denies any knowledge or information, &c. of other matters in the complaint. The Cuba and New York Steamship Company put in an answer, averring that they are sole owners of the ship, and that the ship, on the day of the commencement of this action, was about to sail for Cuba; and their answer then puts in issue the rest of the complaint. Joseph Belknap put in an answer, averring that his name was used in the organization of the new company, and that he made oath to some paper connected with the same; and his answer then put in issue the rest of the complaint. On the trial, the plaintiff proved that a large number of individuals in Cuba (all of whom are defendants in this action) on the 6th of June, 1860, executed an agreement, or articles of copartnership, with each other, and a power of attorney to the defendant Baralt, for the purpose of "forming a company" in New York to "furnish a steamer" to "establish steam communication between New York and Cuba," with a capital of $100,000, in transferable shares of $1000 each, to be increased to a larger sum if the majority of the *partners* should agree to it. The agreement and power provides for the time of payment of installments of the shares, the amount of subscriptions to be taken in Cuba and in New York respectively, the appointment, powers, duties, and compensation of agents of the company, which agents are to be the consignees of the vessel. The 8th clause provides that these agents "will keep separate accounts of the company's business, and the books containing them will at all times be exhibited to any *partner* desiring it." The 11th clause provides for an annual distribution of the *net profit* of the enterprise, and for a reserved fund. The 12th clause provides for building additional vessels, by the application of the reserved fund, and the issue of new shares. The 14th clause provides that the duration of the company shall be

nine years, which may be prolonged by the unanimous vote of two-thirds of the *capital* subscribed. The 16th clause authorizes Baralt, with the agent he may select, to place the company in activity. Baralt presented himself in New York to the plaintiff, with this written agreement and power, in June, 1860, and entered into negotiations with him to carry out this project. Boardman, Holbrook & Co. took part in these negotiations, and Baralt, in them, acted for himself, his partners, and his constituents, under the power. Thereupon the plaintiff entered into an agreement with Boardman, Holbrook & Co., dated the 15th day of September, 1860, for the building of a steamship by the latter, for the sum of $122,000. The agreement provided that a trial trip should be successfully made before delivery; that the expenses and risks, and marine insurance of the trial trip, should be for the account of Boardman, Holbrook & Co., and that the ship was to be insured on account of Boardman, Holbrook & Co. It further provided that the payments, under a sub-contract with the builders of the hull, should be guaranteed by the plaintiff, who should make these payments direct to the builders of the hull. At the same time Boardman, Holbrook & Co. entered into a contract with the plaintiff, agreeing, in consideration of the said contract for building the ship, and of the sum of $2000 *paid by the plaintiff*, to take an interest in the ship to the amount of $20,000, in the cost of said ship, for which amount Boardman, Holbrook & Co. agreed to subscribe for stock in a company to be organized, or to be interested in a partnership for that purpose, if it should be deemed best to establish such partnership, the amount of the $20,000 to be deducted ratably from the several installments payable under their contract for building the ship. They also agreed that the plaintiff should be the agent of the ship, for the city of New York, upon the terms agreed on between the plaintiff and the other owners or *stockholders* of said ship. They also agreed to make a deduction of 2½ per cent from the price of the ship, to be allowed as a commission

to the plaintiff, and to be by him allowed to the owners of the ship. Whereupon Boardman, Holbrook & Co. contracted with J. Simonson to build the hull for $51,000, and the plaintiff, in pursuance of his covenant with Boardman, Holbrook & Co., guaranteed the payment of the $51,000. At first it was the intention of the parties in Cuba that this should be a partnership enterprise, and it was the intention of the parties in New York that it should be either a partnership enterprise, or else an interest in stock of a corporation, which corporation should be the sole owner of the ship. The latter intention prevailed, and in pursuance of the said previous regulations, and about the same time with the contract for the building of the ship, the parties agreed to form a company, and they did form a company, in October, 1860, under the general laws of this state, by filing a certificate of incorporation, subscribing to the stock, and appointment of officers. The certificate of incorporation, dated October 1, 1860, was subscribed by the plaintiff, Baralt, Boardman, Holbrook and others, and appointed directors, among them the defendant Boardman and the plaintiff. The capital of this company was $120,000, and its objects the same as those expressed in the said articles of copartnership. The subscription list to the stock of the company was subscribed by the plaintiff for 13 shares for $1000 each; by Valiente & Co. for 30 shares for $1000 each; by Boardman, Holbrook & Co. for 20 shares for $1000 each; by Joaquin Baralt for 57 shares for $1000 each, as attorney for the persons who subscribed the articles of copartnership in Cuba, and as attorney for Felix Frerer, Antonia Colas, and Manuel de La Torre. The plaintiff was appointed agent of the company in October, 1860. The Cuban subscribers paid their subscriptions through the Cuban house of Valiente & Co., who remitted to the plaintiff, who paid the remittances to the builders of the ship. Boardman, Holbrook & Co. paid their subscriptions by deducting their quota from the cost of the ship. The plaintiff, on signing his contract above mentioned with

Boardman, Holbrook & Co. paid the $2000, being the same sum mentioned in one of the contracts, "on account of contract for building" the ship. The plaintiff considered this payment as made on account of his subscription to the capital stock. On the 1st of November, 1860, the first installment of 25 per cent on the stock was payable to the builders of the ship, amounting to the sum of $25,112.50. On the 1st of November, 1860, the plaintiff paid to the builders of the ship $23,112.50, making, with the $2000, the exact amount due on that day, $25,112.50. These two payments were made up of the amount of $\frac{1}{4}$ of the plaintiff's subscription of $13,000 to the stock, viz., $3250 paid with the plaintiff's own money, an additional sum of $138.97 of the plaintiff's own money, and all the money theretofore received by the plaintiff from the Cuban subscribers. The plaintiff intended all these payments of his own money as a payment on account "of the subscription made" by him "to the stock of the ship." Besides this, the plaintiff had, with the approval of Baralt, made various disbursements for the ship, and the first company, amounting to over a thousand dollars. The plaintiff intended that these also should go against the subscriptions made by him to the stock of the ship. These various payments made by the plaintiff, and some subsequent payments made by the plaintiff to the builder, after crediting all the remittances received from the other subscribers to the stock, amounted, with interest to January 1st, 1861, to the sum of $4598.95. In January, 1861, the plaintiff informed Baralt, then in New York, that it was doubtful if the plaintiff would continue the payment of his whole subscription of $13,000 to the stock. He at the same time made a similar statement to Boardman. Baralt expressed the opinion that he could arrange the difficulty on his return to Cuba. On his return to Cuba, Baralt wrote to the plaintiff, "On being informed of the deficiency which results in the capital from your not being able to continue in the payment of the $9000 remaining of your shares, some of the principal stock-

holders present took said shares, with which our common capital is completed, and a difficulty obviated which seemed so great in New York." Baralt subsequently made a like oral declaration to the plaintiff. In June, 1861, Baralt asked the plaintiff for an account of the moneys he had contributed, and the plaintiff gave Baralt the account already referred to. In June, 1861, Baralt told the plaintiff, as a reason for the formation of a new company, that as he, Baralt, and others, had not been able up to that time to pay the builders of the ship in full, by paying their quota of subscription, a loan upon the vessel was necessary; that the party making the loan would, of necessity, in order to secure himself, become president of the new company. Baralt also told the plaintiff that he wanted liberty of action, in regard to the formation of the second company. The plaintiff replied to Baralt, that if he would do what was right, he, the plaintiff, would put no obstacle in his way; telling him at the same time, that the balance shown by the account he had given Baralt, $4598.95, due December 31, 1860, must be considered to represent the plaintiff's interest in the ship. In the plaintiff's conversation with Baralt, and the others interested in the ship, he always made the payment of the balance a condition of his relinquishing all interest in the ship. In June, 1861, Baralt for the first time objected to the plaintiff being interested in the ship. On the 15th day of June, 1861, the defendant Baralt executed to the defendant De Mier a mortgage on six-seventh parts of the ship, to secure the payment of $35,000 in ninety days, reciting in the mortgage that the ship had never been registered or enrolled, and that Boardman, Holbrook & Co. owned the other seventh part of the ship. On the 11th day of July, 1861, the defendants organized the second company, "The New York and Cuba Steamship Company," with a capital of $180,000. On the 11th day of July, 1861, the directors of this new company, including the defendants De Mier, Boardman, Valiente and others, held the first meeting of the board of directors, and appointed the defend-

ant De Mier president of the new company, and resolved that the ship be accepted as the full amount of the capital stock of the company, $180,000. The board of directors never transacted any other business. This new company was formed without the assent of the plaintiff. On the 13th of July, 1861, Simonson, the builder of the hull, gave a builder's certificate, stating that he had built the ship for account of the new company, the Cuba and New York Steamship Company. On the 17th day of July, 1861, the defendant De Mier, as president of the new company, took out a register for the ship, he, De Mier, making oath that the stockholders of said company were the only owners of the ship. The answers admit that the ship had been conveyed to the new company; that the plaintiff's advances have never been paid; and that he has been excluded from all interest in the ship; and claim that the new company is sole owner of the ship. The plaintiff offered to show that the ship had been sold without his knowledge or consent, but the court excluded the testimony. The counsel for the plaintiff offered to prove the amount the subscribers to the stock, other than the plaintiff, were in arrears at different times, but the court excluded the testimony. The counsel for the plaintiff offered to prove that the defendant Baralt and his confederates had sold the ship to the United States government, but the court excluded the testimony. The plaintiff's counsel offered to prove that the defendant De Mier had sold the ship for $200,000, had received the proceeds of sale, had paid a part of these proceeds to Baralt, a part to Boardman, Holbrook & Co., and had kept the rest himself, but the court excluded the testimony. On the foregoing testimony, the court being of the opinion that the plaintiff was not entitled to any relief in this action, the plaintiff offered to show, by reading in evidence the deposition of the defendant Baralt, taken on behalf of the defendants, that the said Baralt agreed to pay the plaintiff the amount of his account, if the plaintiff would consent to relinquish his agency and interest in

the ship, and consent to the new arrangement by which the plaintiff was excluded from any interest in the ship, and that the plaintiff complied with these conditions; but the court refused to receive the evidence. The plaintiff then moved to amend the complaint so as to make it conform to the proof thus offered, which motion the court denied. The court then dismissed the complaint, on the grounds that the plaintiff being a part owner of the ship, an action would not lie against his co-owners, as no conversion or destruction of the vessel had been proved; that the owners of said ship were tenants in common, and no act had been alleged or proven that would entitle the plaintiff to the equitable interposition of the court. To all these adverse rulings the plaintiff excepted.

Henry A. Cram, for the apppellant.

I. T. Williams, for the respondents.

SUTHERLAND, J. After a careful examination of this case, I can not avoid thinking that the pleadings were drawn and that the action was tried without any very definite idea of the ground or principle upon which the plaintiff had, or claimed to have, a right to equitable relief.

I am inclined to think that when the plaintiff rested, and the defendants moved to dismiss his complaint, he had presented on the pleadings and proofs a *prima facie* case for equitable relief; and it is very plain to me that his complaint should not have been dismissed on the ground upon which it was dismissed, which ground, as I read the case, was substantially that the property in the ship was in the parties as tenants in common; that no conversion or destruction of the ship having been proved, no action would lie by the plaintiff against his co-owners; that no act had been alleged or proved which entitled the plaintiff to equitable relief as a tenant in common.

Now, in my opinion, there was no question of tenancy in common, or of joint tenancy in the case. As between Boardman, Holbrook & Co., as contractors for the building of the ship, and the plaintiff as the party with whom they made the contract, and as between them as such contractors and the first corporation, "The New York and St. Jago Steamship Company," no doubt the property in the ship was in Boardman, Holbrook & Co. until her delivery by them under the contract, (*Andrews* v. *Durant*, 1 *Kern.* 35;) but as between the plaintiff and such of the defendants as were officers or stockholders of the first corporation, "The New York and St. Jago Steamship Company," and as between the plaintiff and such of the defendants as took or acquired their stock or interest in the second corporation, "The Cuba and New York Steamship Company," with notice or knowledge of the plaintiff's interest or rights in the first corporation, or of his rights as between him and the first corporation, or the stock subscribers of the first corporation, I think the property in the ship was in the first corporation. In looking at the case made by the pleadings and by the proofs, when the plaintiff rested and his complaint was dismissed, to see whether he was entitled to the equitable relief specifically asked for, or other equitable relief, as against all or any of the defendants, I think the property in the ship should be considered to be in the first corporation. I think the judge at special term, on the pleadings and proofs, for all the purposes of the action, should have considered the title or ownership of the ship to be in the first corporation, and to have been from the time of its organization.

I do not see why the first corporation was not regularly organized under the act. At all events, it appears to me that such of the defendants as participated in its organization, or subscribed for its stock, ought not to be permitted to allege any irregularity in its organization to defeat the plaintiff's equity.

I think the question of equitable relief of any kind, and

as to any of the defendants, was between the plaintiff, either as a stockholder or creditor of the first corporation, and such defendants. If so, the question of tenancy in common, or of joint tenancy, or of part ownership, was not in the case, for a stockholder, as such, can not properly be said to have the interest of a tenant in common, or joint tenant, or of a part owner, in the property real or personal in which the capital or capital stock is invested during the lifetime of the corporation.

If the plaintiff's position was that of a stockholder of the first corporation, or he had a right to be regarded as claiming relief as such, the opinions at general term and special term, in *Abbot* v. *The American Hard Rubber Company*, (33 *Barb.* 580,) and the cases referred to in the opinions, will sufficiently illustrate the equitable ground or principle on which, I suppose, he was, on the pleadings and proofs, entitled to equitable relief, at least, as against those of the defendants who were officers or stockholders of the first corporation, and who participated in the acts charged in the complaint, and the necessary effect of which was the destruction of his rights as such stockholder. (*See also The People* v. *The Albany and Vt. R. R. Co.* 24 *N. Y. Rep.* 261, *and memorandum of the Reporter at the end of the case.*)

I think that, at all events, as to such defendants, the plaintiff was a stockholder in the first corporation, and had a right to be regarded as a stockholder to the amount of $3250, and probably to the whole amount claimed, particularly considering Barait's letter from Cuba; the mortgage by De Mier; the organization of the second corporation without consulting the plaintiff; the repudiation by the answers of any right of the plaintiff in the second corporation as a stockholder or otherwise; the registry of the ship (the only property of the first corporation) in the name of the second corporation; the offers by the plaintiff to show that subscribers to stock in the first corporation other than himself were in arrears; and his offer to show that the ship had been sold

to the United States government by Baralt and his confederates, and the proceeds of the sale ($200,000) divided between De Mier, Boardman, Holbrook & Co. and Baralt.

I think the evidence offered, to show that others of the subscribers to the first corporation (who are all defendants in this action) were in arrears as to their subscriptions for stock in the first corporation, should have been received, as it would have tended to show that they ought not to take the position in this action, that the plaintiff was not a stockholder in the first corporation, but was to be considered a mere creditor of that corporation, because he had not paid up his stock in full.

I think, too, the proof as to the sale of the ship to the United States was proper, and should have been received, even if it was not necessary to show what relief, and the extent of the relief, which should be granted.

The very ground upon which the complaint was dismissed may be said to assume, that the plaintiff was or should be regarded as a stockholder in the first corporation; for he could not be a tenant in common without having an interest in the ship, and it was not pretended, and there was not a pretense for pretending, that the plaintiff had any interest in the ship, except what came from his subscription for stock in the first corporation, and the payments he had made.

Even if the plaintiff was to be regarded as a mere creditor of the first corporation, I am by no means prepared to say that his complaint could have been rightfully dismissed. The defendants, or some them, had got the only property of that corporation, or had put it in a position that he could not reach it at law. I think the case shows, that this had been done in a way, or by acts, which must be deemed fraudulent as to the plaintiff, even regarding him as a mere creditor of the first corporation. Nothing was left of the first corporation but its corporate name. A judgment and execution against it would have been fruitless. Possibly, under the provisions of the act under which the corporation was organ-

ized, the plaintiff as a creditor of it might have maintained an action against one or more of the defendants as subscribers for stock in the first corporation, after judgment and execution against the corporation; but, considering that none of the defendants demurred, but all answered, and that the question as to the plaintiff's right to relief as a creditor is presented by the dismissal of his complaint, I do not think that it can be said that his complaint could have been rightfully dismissed, even regarding him as a mere creditor of the first corporation.

A court of equity has jurisdiction in all cases of fraud. In some cases of fraud courts of law have concurrent jurisdiction; and, in many cases of fraud, it has been the practice or usage of courts of equity to decline to exercise their jurisdiction, but leave them exclusively to courts of law; but, even in such cases, it can not be said that courts of equity have not jurisdiction. I am inclined to think that, in the principal case, regarding the plaintiff as a mere creditor of the first corporation, the special term could not properly have declined to exercise its jurisdiction, on the ground that he had a remedy at law, or had not exhausted his remedy at law.

My conclusion is, that the judgment of the special term should be reversed, and that there should be a new trial, with costs to abide the event of the action.

Leonard, J. The steamship was conveyed by taking out a register in the name of the Cuba and New York Steamship Company as owner, through the action of some or all of the other defendants, wrongfully and in disregard of the rights of the plaintiff. Simonson did not, in fact, build the ship for that company, and in giving the builder's certificate, which entitled that company to take out a register, he but followed the directions of certain of the defendants whom he supposed authorized to direct him in respect to the vesting of the title to the ship, or obtaining the usual *indicia* of title. It was, nevertheless, the act of those who procured,

directed or controlled the use or application of that certificate and the affidavit of De Mier. Up to that time the moneys of the plaintiff, and of the individual defendants, except De Mier, had been used in constructing this steamship, and they, who so advanced their money, were copartners in the adventure.

The act of causing the steamship to be vested in the Cuba and New York Steamship Company, or in excluding the plaintiff from his interest in her, was a conversion of the partnership property by some of the partners, in which all of them, who have participated in the divisions of the funds or the proceeds of the sale, must be held to be bound, either as actors or by ratification of the act.

The plaintiff has been excluded from participation. He is entitled to an account as against these partners; or, at least, he may be so entitled, if the facts and positions above stated are finally borne out by the proofs on both sides, at the close of the case.

I am satisfied that the complaint was incorrectly dismissed, and that the plaintiff was then entitled *prima facie* to an account, as against his partners, of the value of the partnership property converted by them from which he was excluded.

The New York and St. Jago Steamship Company never went into operation, and seems to have but little to do with the case, except as showing the intention, originally, of those who were active in promoting the enterprise, and who conducted the operations of those who contributed to the adventure. This company never had any title or interest in the property created by the money of the individual contributors. The stock subscribed for was never paid in as capital. The money raised was paid out directly for construction, and not for shares subscribed for in the New York and St. Jago Steamship Company. The ship was built by individuals, not by a corporation. There was no person elected as president, or to any other office, and never a dollar of capital paid in, so far as it appears by the evidence.

Proof of the amount in which the subscribers to the stock of the New York and St. Jago Steamship Company, other than the plaintiff, were in arrear in their payments was not material, and the evidence offered on this point was correctly excluded.

The offer to prove the sale of the ship to the United States government, and the price received, was wholly immaterial, except as the appropriation of the proceeds might be shown, for the purpose of establishing the participation of the defendants, who were partners in constructing the ship, in the proceeds of the sale, and thus showing their ratification of the proceeding whereby the plaintiff was excluded from the partnership property to which he had contributed.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

GEO. G. BARNARD, J. concurred.

New trial granted.

[NEW YORK GENERAL TERM, November 7, 1864. *Leonard, Geo. G. Barnard* and *Sutherland*, Justices.]

SLOSSON *vs.* LYNCH, administratrix &c.

The words "next of kin," used *simpliciter*, in a limitation of personal property by will or deed, without any thing in the context showing a different meaning, mean those of the *kindred* or *blood*, who take by the statute of distributions, in case of intestacy, including representatives, but excluding the widow, as such.

And under such a limitation, such kindred, including those claiming by representation, will take according to the statute; that is, the shares or portions prescribed by the statute.

APPEAL from a judgment rendered at a special term settling the construction of a marriage settlement executed previous to a contemplated marriage between Miss Charlotte

E. Ogden and ——— Lawrence, and declaring the rights of the parties, under the same. The subject of the deed of settlement was wholly personal property. By the deed of settlement, Mrs. Lawrence was to have the income for life, with a certain power of appointment by will or otherwise, in the event of her death before her husband, and in the absence of any appointment, then the property was to go to her issue then living, and the children of such as might be deceased, *per stirpes* and not *per capita*, and, in default of such issue, "to the next of kin of the party of the first part," Charlotte E. Ogden, afterwards Mrs. Lawrence. Mrs. Lawrence died before her husband, without issue and without having made any appointment. At the time of the execution of the settlement, Mrs. Lawrence had neither father, mother, nephews or nieces, but she had two sisters, Sarah Goelet and Grace W. Ogden, and one brother, Jonathan Ogden. The two sisters survived Mrs. Lawrence, but the brother died before she did, leaving three children, the defendants, Jonathan Ogden, Charlotte W. Kernochan and Grace W. Kernochan. The question was, whether these children of the deceased brother were entitled to share in the distribution of the fund. The court below held, as a conclusion of law, that the two sisters of Mrs. Lawrence were alone entitled to the fund, and that the children of the deceased brother took nothing. From this judgment the defendants, Jonathan Ogden, Charlotte W. Kernochan and Grace W. Kernochan, (their husbands joining,) appealed.

W. M. Evarts, for the appellants.

Daniel Lord, for the respondents.

By the Court, SUTHERLAND, J. It is evident that the sole question is as to the meaning of the words, next of kin, in that clause of the settlement limiting the property to the next of kin, in default of appointment and of issue.

Had we not been referred to certain comparatively recent English cases, (*Elmsley* v. *Young*, 2 *Myl. & K.* 780; *Witty* v. *Mangler*, 4 *Beavan*, 358,) affirmed by the house of lords, (10 *Clark & Finnelly*, 215,) holding that the words "next of kin," used *simpliciter*, are to be taken to mean "nearest of kin," I should probably have stated the question in the principal case to be, whether the words "next of kin" were used in the settlement in their technical statutory sense, or meant nearest of kin; and then, assuming that the words "next of kin," used *simpliciter*, had a well known technical statutory meaning, I should have contented myself with saying, that there being nothing on the face of the instrument, or in the context, to show that the words were used in a sense other than the technical statutory sense, it was to be presumed the parties used them in that sense.

Though the English decisions referred to are not obligatory upon us, yet respect for so high authority prevents me from assuming that the words "next of kin," used *simpliciter*, in a limitation or disposition of personal property, by will or deed, have any technical meaning; and I will therefore state the question in the principal case to be, whether the words "next of kin," in the limitation by the deed of settlement, in default of issue and of the exercise of the power of appointment, mean nearest of kin? By stating this to be the question, I do not assume that the words "next of kin," used *simpliciter*, have a technical meaning; but I undertake to show that they have a technical statutory meaning, and that this meaning is not the nearest of kin, but those of the kindred or relations by blood, who in cases of intestacy, by the statute of distributions, succeed to, or share in, the intestate's personal property; and that the words "next of kin" and the word distributee, under the statute, are not synonymous, but that the words "next of kin" mean such of the distributees as are of the kindred or relations by blood.

It may be well to refer to a few of the established rules in

construing wills and other instruments disposing of or limiting the property, before examining the question in the case.

1. They are to be construed so as to carry into effect the intent of the parties, to be gathered from the whole instrument, so far as such intent can, by law, be carried into effect.

2. Words are to be taken in their ordinary popular meaning, and the intention is not to be defeated by the use or misuse of technical terms.

3. Nevertheless, if technical terms are used, it will be presumed that they are used in their technical legal sense, unless the context shows that they were intended to be used in a different sense. (*De Kay* v. *Irving*, 5 *Denio*, 646. *Lane* v. *Lord Stanhope*, 6 *T. R.* 352. *Hodyson* v. *Ambrose*, *Douglas*, 337.)

In the principal case, there is certainly nothing in the context to show that the words "next of kin," in the limitation to the "next of kin," were not used in their strict technical legal sense, if they had any. On the contrary, I think the use of the words "or other next of kin," in mentioning the objects of the power of appointment, and the use of the technical terms *per stirpes*, and not *per capita*, in the limitation to the issue of Mrs. Lawrence, and the children of such as may be deceased, previously, in the same sentence, tend to indicate that the words "next of kin," in the limitation to the "next of kin," were used in a technical sense if they had any.

The question, then, is whether the words "next of kin" simply had or have the technical meaning above stated. I think it may be said that they have had this technical meaning since the statute of distributions, (22 *and* 23 *Car. 2d. c.* 10,) and that this statute originated and gave this technical meaning to them.

The word next, as used in the sixth section of the statute, was not used to express near or nearest alliance by blood to the intestate, but next in place or order, to or after children and their representatives, previously mentioned in the section. The truth is, that the word next, as an adjective, is

rarely, if ever, used even in conversation, to express nearness, or degree of nearness by blood or affection, between another person and the speaker, except as next after, next in order or degree, to some other person, previously mentioned.

Certainly, if one should hear a person call another his next friend, he would not, by these words, unexplained, understand his near or nearest, dear or dearest friend by affection, without reference to any other person; but he would probably understand his next door neighbor, or a friend next in place, time or degree, to or after some other friend, or technically his "next friend" in some legal proceeding. I suppose it will not be denied, that the words "next friend" have acquired a technical meaning, which originated in a very old statute.

The word next was not used in the statute of distributions to express the relationship, or the degree of relationship, by blood to the intestate, but, as between the children and their representatives and other kindred of the intestate, the order in which the kindred should succeed to or share in the personal estate.

The children and their representatives are not expressly called kindred in the statute, but they are impliedly called so, and so are the legal representatives of the "next of kindred" within a certain limitation.

Now, considering that, previous to this statute, there appears to have been no way of enforcing the distribution of estates of intestates; that the administrator could keep the whole surplus, (*Edwards* v. *Freeman*, 2 *P. Wms.* 447, 448; 2 *Blk. Com.* 515;) that the statute may therefore be said to have first given the right of distribution; that the statute regulates the distribution as between the widow, by the term wife, and the kindred, and then the order in which kindred shall take or share, first, children and their representatives, and then, the next kindred in equal degree, and their representatives, within a certain limitation; and that the statute probably originated the principle of representation in the

succession to personal estates of intestates; is it not plain, as the word heir or heirs acquired its technical legal meaning, from the act or fact of the succession to estates of inheritance (*ex hereditate*) by descent, that is, by law, so the words "next of kindred," or "next of kin," taken from the statute of distributions, would be likely, after the statute, to acquire a technical legal meaning from the act or fact of succession under or by the statute; and that this meaning would be likely to be, not synonymous with distributees, under the statute, but the kindred or blood relations (including those claiming by representation, but excluding a widow as such) who, in fact, had the right of succession, or the right to share in the distribution by the statute?

The whole history of the administration of this statute of distribution and of the statute 1 *Jac. 2d, ch.* 17, altering it in certain respects, and of our statutes of distribution, (1 *R. L.* 313, § 16; 2 *R. S.* 96, § 75,) shows that the words "next of kin" have acquired this technical meaning.

The cases holding that the widow, as such, is not included in these words used *simpliciter*, nor the husband, where the wife has a power of appointment to her next of kin simply, show that the words "next of kin" have acquired this technical meaning. (*Green* v. *Howard*, 1 *Bro. Ch. Rep.* 29. *Watt* v. *Watt*, 3 *Ves.* 244. *Garrick* v. *Lord Camden*, 14 *id.* 381, 382. *Bailey* v. *Wright*, 18 *id.* 49. *Wilson* v. *Frazier*, 2 *Hump.* 30. *Wright* v. *Meth. Epis. Ch., Hoffman*, 212, 213.) No doubt these words have been used frequently as meaning distributees generally, including the widow, when there was no occasion to discriminate as to the description or character by which the distributee or distributees claimed; but, when thus used, they were used in a secondary, statutory and technical sense.

I doubt whether it can be said that these words have ever acquired an ordinary, popular meaning, synonymous with nearest relations or nearest of kin.

As was pertinently said on the argument, no one speaks

of his or another's dearest next of kin. Any one would be surprised to hear a sane person say such a one has a next of kin born, or another next of kin born, or has a certain number of next of kin. There has been no occasion (the wants of the language have not required) that the statutory word next should supplant, or be used instead of, the word near or nearest, to express close or closest alliance by blood or affection to the speaker.

The philosophy of language shows that one word is much more likely in course of time to acquire a secondary, and a variety of secondary (if the expression is permissible) meanings, than three words, used in connection in a particular manner and for a particular purpose, in a statute, neither the first or last of which could be dropped without destroying their statutory meaning.

It is easy to see how the word heir, or heirs, came to have a secondary, and, perhaps, more than one secondary meaning. First, you have heir, or heirs, meaning he, or they, who succeed to estates of inheritance by descent, by law; then you have heir, or heirs apparent or presumptive, and then you have heir or heirs, with the word apparent or presumptive dropped, meaning a living child or children. No one would be surprised at the remark that A. B., his neighbor, has an heir, or another heir, or a certain number of heirs.

I think it may be said, that all of the English cases prior to *Elmsley* v. *Young*, (2 *Myl. & Keen*,) before mentioned, (in 1835,) tended to show that the words "next of kin," used *simpliciter*, in a will or deed, disposing of, settling or limiting personal property, had this meaning. I am certainly safe in saying that this was the first decision to the contrary.

In *Roach* v. *Hammond*, (*Prec. in Ch.* 401,) the devise was to H. of all the testator's personal estate, for the use of his relations, without specifying any in particular, or using any other words; and it was decreed that those relations (as I understand the report of the case,) who, by the statute of

distributions, would be entitled to personal estate in case the testator had died intestate, should take the property in the same proportions.

In *Thomas* v. *Hole*, (*Cases in Eq. in temp. Talbot*, 251,) there was a bequest of £500 to the relations of Elizabeth Hole, to be divided *equally between them.* At the testator's death, Elizabeth Hole had two brothers living, and several nephews and nieces. It was determined first, that the word relations should be confined to such relations as were within the statute of distributions, and next, as the testator had directed the £500 to be divided equally among them, that the brothers, nephews and nieces take *per capita.*

This decision appears to have governed the decisions in *Edge* v. *Salisbury*, (*Ambl.* 70,) and *Isaacs* v. *Defriez*, (*Id.* 595,) where the words were "poorest relations;" *Widmere* v. *Woodroffe*, (*Id.* 636,) where the words were, "the most necessitous of my relations;" *Harding* v. *Glynn*, (1 *Atk.* 469;) *Winthorne* v. *Harris*, (2 *Ves.* 527,) where the words were, "near relations;" *Green* v. *Howard*, (1 *Bro. Ch. R.* 28, *Park. ed.*,) where the words were, "to my own relations who shall then be alive, share and share alike;" *Phillips* v. *Garth*, (3 *Bro. Ch. R.* 64,) where the words were, "to be divided among the next of kin, share and share alike;" *Rayner* v. *Mowbray*, (*Id.* 234,) where the words were, "to and among all and every such person and persons who shall appear to be related to me only, share and share alike;" *Lowndes* v. *Stone*, (4 *Ves.* 649,) where the gift was of a residue to the testator's "next of kin, or heir at law, whom I appoint my executor," (the testator in this case leaving one brother, and by deceased brothers a niece and several nephews, one of whom was his heir at law, and distribution according to the statute being decreed;) *Vaux* v. *Henderson, reported in note to Horseman* v. *Henderson*, (1 *Jac. & Wal.* 387,) where there was a legacy to A. "and, failing him by decease before the testator, to his heirs," and A. dying before the testator, the legacy was decreed to belong to the next of kin of A.

living at the time of the testator's death; *Stamp* v. *Cooke*, (1 *Cox*, 23,) where the words were "next relations," coupled with words tending to show that the testator meant by "next relations" sisters, nephews and nieces, and where Lord Kenyon expressly said, if a testator makes a bequest to his "next of kin," and stops there, the statute was the rule to go by; *Hinckley* v. *McLaurens*, (1 *Myl. & Keen*, 27,) where the words were, "next of kin," used *simpliciter*, in a gift over, and where it was held, that these words, without any explanatory context showing a different intent, must be taken to mean next of kin according to the statute of distribution. Of these cases, the last, and *Phillips* v. *Garth*, (3 *Bro. Ch. Rep.*) are directly in point, for in these cases the words "next of kin" were used *simpliciter*, and without any words qualifying them, as descriptive of the object or objects of the gift. It will be recollected that in *Phillips* v. *Garth*, the words were, "to be divided among the next of kin, share and share alike." Justice Buller held that the gift should be divided *per capita*, and not *per stirpes*, among surviving brothers and nephews and nieces, representing deceased brothers and sisters, because the gift was to "next of kin, share and share alike;" but I do not see that this holding impeaches the decision as to the technical meaning of the words "next of kin." The words "share and share alike" did not qualify the words "next of kin," as descriptive of the objects of the gift. It is probable, however, that the holding, that the brothers, nephews and nieces should take *per capita*, led to the doubting remarks, (*Brandon* v. *Brandon*, 3 *Swanst.* 319; *Garrick* v. *Lord Camden*, 14 *Ves.* 385, and *Smith* v. *Campbell*, 19 *id.* 404,) about the decision in *Phillips* v. *Garth*, but those cases did not call for such doubts. In *Brandon* v. *Brandon*, the words of the marriage settlement were, "to the *nearest* and next of kin" of the wife. In *Garrick* v. *Lord Camden*, the words of the residuary clause of the will were, "to be divided amongst my next of kin, *as if I had died intestate*." In *Smith* v. *Campbell*, the words of

the bequest were, "to my *nearest* surviving relations in my native country, Ireland. In none of these cases were the words "next of kin" used without qualifying words.

In *Brandon* v. *Brandon* the word nearest may be said to have qualified the words "next of kin;" in *Smith* v. *Campbell* the words "surviving relations" were qualified by the word *nearest* and the subsequent words. The very question in the principal case is, whether the words "next of kin," used *simpliciter*, mean nearest of kin; and that was the question in *Elmsley* v. *Young*, (2 *Myl. & K.* 780,) reversing the decision of the master of the rolls in the same case, (*Id.* 82,) and overruling *Phillips* v. *Garth*, and *Hinckley* v. *Maclarens*. In *Garrick* v. *Lord Camden*, the additional words, "as if I had died intestate," left no room for doubt. If, in the principal case, the words, as if she had died intestate, had been added to the words, "the next of kin of the said party of the first part," we never should have had this case before us.

In *Anonymous*, (1 *Madd.* 31,) and in *Wimbles* v. *Pitcher*, (12 *Ves.* 433,) where the words were, "next of kin, in equal degree," the decisions went upon the additional words, "*in equal degree.*"

In *Colton* v. *Scaranke*, (1 *Madd.* 35,) where the words in a limitation by settlement were, "to the next of kin of the said Anne Parr, her own blood and family, as if she had died sole and unmarried," it was held that the next of kin took as under the statute of distributions.

I will refer to a few cases prior to *Elmsley* v. *Young*, where other general words were used as descriptive of the object or objects of the limitation, devise or bequest. In *Robinson* v. *Smith*, (6 *Simons*, 47,) the testator bequeathed £700 to his daughter's husband, his executors, &c. in trust, to pay the interest to his daughter, for her separate use for life; after her death to such persons as she should appoint by will, and in default of appointment, to "her personal representatives;" and it was held that her next of kin, to the

exclusion of her husband, were entitled to the £700. (*See also Baines* v. *Otley*, 1 *Simons*, 465.)

In *Crosby* v. *Clare*, (*Amb.* 397,) and *Parsons* v. *Baker*, (18 *Ves.* 476,) the general word was descendants, but that was qualified by other words, so as to show that a class of descendants was meant. In neither of these cases was there any question of claiming by representation. In *Butler* v. *Stratton*, (3 *Bro. Ch.* 367,) the legacy was to the descendants of A. and B. *equally*, and it was held that children and grandchildren took *per capita*.

In *Wright* v. *Alkyns*, (1 *Turn. & R.* 143,) it was held, that under an immediate devise to A. for life, remainder to "my family," the heir-at-law of the testator is entitled in remainder. (*See the opinion of the lord chancellor in this case*, 158 *to* 164.)

I think it may be said, that not one of the cases prior to the decision in *Elmsley* v. *Young*, (2 *Myl. & K.* 780,) interferes with the decisions in *Phillips* v. *Garth* and *Hinckley* v *Maclarens*, but that most of them tend forcibly to support these decisions; but it is not to be denied, that as the views of the lords commissioners in *Elmsley* v. *Young* were affirmed by the house of lords in *Witty* v. *Mangler*, (10 *Clark & Fin.* 215,) it may be said to be now established in England, that the words "next of kin," when used *simpliciter*, as descriptive of the objects of a bequest, or of a limitation of personal property in a marriage settlement, without any reference to the statute of distributions, or any words in the context to show a different meaning, must be taken to mean "nearest of kin;" but Lord Campbell said, in substance, that he concurred in this decision with great reluctance; that they were driven to put a construction upon the terms "which could not by possibility have entered into the contemplation of the parties, or the gentleman who framed" the settlement; that the law had, "by some bad luck, got into a strange state," and that, upon the whole, it seemed to him, that greater mischief would ensue "from shaking or overturning

that case of *Elmsley* v. *Young* than by adhering to it." He further said: "If I had had to decide *Elmsley* v. *Young*, I should certainly have hesitated a good deal before I came to the decision that was pronounced by those very learned judges, the then lords commissioners."

I think the decision in *Elmsley* v. *Young*, by the lords commissioners, shows that the greatest judicial mind is liable to fall into a rut, and, when it does, common sense teaches that its very load of learning tends to keep it in.

In my opinion, there is nothing in the opinions of the lords commissioners in *Elmsley* v. *Young*, or in the opinion of Lords Cottenham and Campbell in *Witty* v. *Mangler*, which shows that the decisions in these cases should be adopted or followed here.

I am not aware of any case in this state deciding the question in the principal case.

The last sentence in the second paragraph of the head note in *Wright et al.* v. *Trustees of Methodist Episcopal Church*, (*Hoffman's Ch.* 202,) is wholly unauthorized. It was not decided in the case, and there was no occasion to decide, that the phrase "next of kin," when used *simpliciter*, does not mean those entitled under the statute of distributions, but the next in blood. It was held, in that case, that the legacy to Euphemia Murray did not lapse, but that her next of kin took. She left children, but no grandchildren.

There was no claim by representation, or *per stirpes*. Vice-Chancellor Hoffman refers to the decision of the lords commissioners in *Elmsley* v. *Young*, but he says that the decision did not interfere with his decision, and it clearly did not.

In *Drake* v. *Pell*, (3 *Edward's Ch.* 251,) the words "heirs, devisees or legal representatives of the child so dying" were held to mean "next of kin" of the child so dying, the subject of the gift being money. There was no claim *per stirpes*, or by representation, in this case.

In *Dominick* v. *Sayre*, (3 *Sand. S. C. Rep.* 555,) there was a devise by Dominick of eight lots of land to the testator's

daughter, Margaret, for life, with power to give the same by deed or will to any of the male descendants of the testator's family of the name of Dominick. The daughter, by her will, devised the lots to male descendants of the testator by the name of Dominick, and among them she gave to her nephew John Jacob, son of her deceased brother Jacob F., two of the lots. The nephew died before his aunt, whereby the devise to him lapsed, and thereby the legal estate in the two lots became vested in the residuary devisees of the original testator and their heirs, subject to the execution by the court of chancery of the power so given to the daughter. The only male descendants of the family of the testator of the name of Dominick were, as I understand the facts, grandsons of the testator and sons of two of the grandsons, and it was held that all the male descendants were entitled to take *per capita*, and not *per stirpes*.

This decision was probably right, for it might be said that the power of appointment given to the daughter was limited to a *class* of the testator's descendants, that is, his male descendants of his family of the name of Dominick; but I have no hesitation in saying, that, in my opinion, a devise to A. B. for life, remainder to his descendants, or to "my descendants," *simpliciter*, should and would be held to be a devise to A. B. for life, remainder to the heirs at law of A. B., or of the testator. In either case, I think the word descendants would be held to mean "heirs at law." Whether the heirs at law would be deemed to take by descent, or under the devise, is another question. Since the statute 3 *and* 4 *Will. IV, ch.* 106, no doubt, in England, the heir would be deemed to take in the character of devisee. (*See* 4 *Kent's Com. 5th ed.* 412, *note c.*)

In *Phyfe* v. *Phyfe*, (3 *Bradf.* 45,) there was a bequest to sons "and their legal representatives," adding, "the legal representatives or children of my said sons to receive such part only," &c.; and it was held, that the words "legal representatives" meant the children, and not the "next of kin"

of the sons, and that substitution was not intended beyond the children of the sons. This decision evidently went on the additional words "or children," &c. (*See also Barstow* v. *Goodwin*, 2 *Bradf.* 413.)

In *McCullock* v. *Lee*, (7 *Ohio Rep.* 15,) the question was between the mother and aunt of a child, under a statute regulating the descent of lands. The words of the statute were: "If there be no brothers or sisters, or their legal representatives, the estate shall pass to the next of kin and *of the blood* of the intestate;" and it was held that the mother took. I do not see how it could have been held otherwise, considering the additional words, "and of the blood," &c., and the extraordinary use of the words "next of kin," in a statute regulating the inheritance of lands. See also *McNeilledge* v. *Galbraith*, (8 *Serg. & R.* 43,) and *McNeilledge* v. *Barely*, (11 *id.* 103,) where the devise of real and personal property was to the testator's wife, "and at her decease, to be divided between her and my poor relations equally."

It is evident that all that has been said about the English statute applies to our statutes of distribution, especially to our present statute, (2 *R. S.* 96, 97, § 75,) which was worded with much more precision and distinctness than the English statute.

Perhaps the remark in the fore part of this opinion, that the English statute of distributions originated and gave a technical meaning to the words "next of kin," requires explanation. I meant, that the statute originated and gave the technical meaning contended for, with reference to the succession to or the distribution of the personal property of intestates; I did not mean that the statute originated the phrase next of kin.

A statute of 31 Edward III provided that, in cases of intestacy, "the ordinaries shall depute of the next and most lawful friends of the dead person intestate to administer his goods." Lord Coke, in *Hensloe's* case, (9 *Coke*, 39,) speaking

of the statute, says "next and most lawful friends" meant the next of blood.

The statute of 21 Henry VIII, ch. 5, provided, that in case any person die intestate, or that the executors named in any testament refused to prove it, the ordinary should grant administration "to the widow of the deceased, or to the next of kin, or to both, as by the discretion of the ordinary shall be thought good." Lord Coke, in speaking of this statute, in Hensloe's case just cited, says, that it gave power to the ordinary to commit administration to the next of blood; but how palpably unauthorized the conclusion (*Cooper* v. *Denison*, 13 *Simons*, 295, 296) from this, that, long after the statute of distributions, the words next of kin and next of blood were synonymous; the very point insisted on being, that the words next of kin were likely to acquire, and had acquired, a technical meaning, in consequence of that statute.

It is not probable that Miss Ogden, when she executed the settlement, thought of the meaning of the words "next of kin." It was natural that she should think of her anticipated issue, and their children. She takes care of them by a special limitation. If she thought of her brothers and sisters, why did she not take care of them by a special limitation? It is evident that the settlement was drawn with technical precision by one well acquainted with the technical meaning of legal terms and phrases. He must be presumed to have inserted the words "next of kin," in the limitation to "the next of kin of the said party of the first part," with knowledge of their technical meaning, if they had any; and the parties, by their execution of the settlement, must be presumed to have adopted them with such technical meaning. And as I can not say that I have a doubt that those words used *simpliciter* meant and mean next of kin, under or according to the statute of distributions, including those claiming *per stirpes* or by representation, my conclusion is, that the judgment of the special term should be reversed; and that we should declare that the defendants, the three

children of Mrs. Lawrence's deceased brother, are entitled to the share of the fund which their father would be entitled to were he living.

We would not be justified in rendering *blind* obedience to authorities, however respectable or high, which have neither the force of constitutional obligation, nor state nor national judicial precedent or approval.

I will say in conclusion, partly by way of excuse for this rather elaborate examination of a question which, unembarrassed by cases, would appear to be so simple, that I find in a deservedly popular law dictionary (Burrill's) the words "next of kin" defined first and most prominently "nearest of blood," (*prochien du saunk;*) and even Judge Story, in his *Eq. Juris.* (*vol.* 2, § 1065, *b*,) says, "next of kin is sometimes construed to mean next of blood, or nearest of blood;" citing *Wittey* v. *Mangler*, (*supra*,) without one word of comment, or of approval or disapproval.

The question of costs is reserved until the settlement of the decree.

Judgment reversed.

[New York General Term, November 7, 1864. *Leonard, Geo. G. Barnard* and *Sutherland*, Justices.]

43 162
49 299
11h 609
23h 344
37a 644
57a 647
58a 367

Richardson *vs.* Abendroth and others.

The secretary of a manufacturing corporation, in performing the services incident to the duties of his office, is a *servant* of the company, within the meaning and intent of the 18th section of the act of February 17, 1848, authorizing the formation of such corporations.

An action will not lie by one stockholder, against fellow stockholders, of a corporation, to enforce a personal liability for a debt of the company.

Though others may have a lien upon, or equitably own, stock in a corporation, the legal title is in, and the legal liability for debts of the corporation upon, him in whose name the stock is registered.

Richardson *v.* Abendroth.

Where stock was hypothecated, by the owner, and afterwards assigned to trustees for the benefit of creditors, neither the pledgee nor the assignee taking a transfer upon the books of the company, or causing themselves to be registered as stockholders; *held* that the title still remained in the original holder; and that he could not sue his fellow stockholders, to enforce a personal liability for a debt claimed to be due him from the corporation. SUTHERLAND, J. dissented.

THIS action was brought against the defendants as stockholders of the "Warner Foundry Machine Company," (a manufacturing corporation formed pursuant to the act of 1848,) upon a judgment recovered by the plaintiff against the company for his services as secretary, his claim against the defendants being founded upon the 18th section of said act, by which stockholders of such corporations are made individually liable for debts due to their "laborers, servants and apprentices, for services performed for such corporation." (*Laws of* 1848, *ch.* 40, *p.* 58.)

Two defenses were set up by the answer: First, that the plaintiff was an officer and not a servant of the company; second, that the plaintiff was a stockholder of the company during the time that his alleged services were rendered, and therefore was equally liable with the defendants for the payment of all debts for which stockholders are rendered liable by the act of 1848. The cause was tried before the court without a jury and the plaintiff nonsuited, on the ground that as such secretary he was not a servant of the corporation. On appeal to the general term a new trial was granted, and the action was again tried, March 3, 1863, at the circuit, before his honor Judge Allen, without a jury, on which trial the following facts were admitted or agreed upon: That the defendants were stockholders of said company, and that the plaintiff held in his own name twenty-five shares, and as one of the firm of E. Richardson & Co. sixty-five shares, of the capital stock of said company, and so it appeared upon the books thereof; that the plaintiff had assigned his individual stock and united in an assignment of the partnership stock as collateral security for the payment of debts; and that

afterwards the firm made a general assignment of all their property, including their said stock, in trust for the benefit of creditors; but that said stock had never been transferred upon the books, but still appears thereon to be a part the property of the plaintiff and a part thereof the property of E. Richardson & Co., of which firm the plaintiff was a member. The defendants' counsel also read in evidence the following extract from the printed copy of the by-laws of said company:

"Sec. 5. The stock of the company shall be transferred only on the books of the company, by the holder, in person, or by power of attorney, which may be in the following form." (Then follows the form of a power of attorney.)

The judge found the following conclusions of law: That the plaintiff, as such secretary, in performing the services for the value of which this judgment was rendered, was a servant of said company, within the meaning and intent of the act authorizing the formation of such corporations. That the plaintiff, having never transferred his stock upon the books of said company, was still a stockholder thereof, and was equally liable with the defendants, for the payment of all debts for which stockholders of said company are liable, and therefore for the payment of the amount due on said judgment for his services. That one stockholder can not sue another to recover a debt, for the payment of which both are liable. The judge accordingly rendered judgment for the defendants, dismissing the complaint with costs. The following opinion was delivered, on rendering such judgment.

ALLEN, J. "I am concluded by the judgment of the general term, granting a new trial, upon the question there considered. The law of the case is, that the secretary of a manufacturing company, incorporated under the law of 1848, (*ch.* 40,) is a servant, within the 18th section of the act, for whose services the stockholders were jointly and severally liable. It is true that it now appears that the plaintiff, while

serving the company as secretary, was also a trustee of the corporation, which fact did not appear upon the former trial. But the character of the service was not altered by that fact; nor the character of the debt contracted for it, changed. It would look very like an attempt to evade the decision, to give a judgment upon the distinction suggested against the plaintiff.

But upon another ground, I think judgment should be given for the defendants. An action will not lie by one stockholder against a fellow stockholder of a corporation, to enforce a personal liability for a debt of the company. To the extent of the personal liability created by the statute, the corporators are partners, and one partner can not sue a copartner for a debt due from all. (*Bailey* v. *Bancker*, 3 *Hill*, 188. *Andrews* v. *Murray*, 33 *Barb.* 354.) The plaintiff was, at the time of the contracting of the debt, a stockholder of the company, liable for this class of its debts; liable to the creditors of the corporation, and liable to contribute to the other stockholders. His liability was absolute, and whether called upon by a stranger, a creditor, upon the original liability, or by his fellow stockholders, to contribute, can make no defense.

First. He was a stockholder, because he was registered as a stockholder, and the statutory liability, no matter who asserts it, is upon him in whose name the stock is registered. Others may have a lien upon, or equitably own the stock, but the legal title is in, and the legal liability upon him who stands upon the books as stockholder. A pledgee, or other transferee of stock, may not be willing to assume the legal responsibility resulting from ownership, and may prefer to run the risk of losing his rights by the acts of the pledgor or assignor. But, without considering the means which may operate to prevent a transfer of the stock upon the books, it is sufficient that the courts of this state have, in well considered cases, authoritatively settled the question. (*Adderly* v. *Storm*, 6 *Hill*, 624. *Worrall* v. *Judson*, 5 *Barb.* 210.

Rosevelt v. *Brown*, 1 *Kern.* 148. *Re. Empire City Bank*, 18 *N. Y. Rep.* 199.)

Second. The stock was never absolutely transferred by the plaintiff, so as to create a liability on the part of the transferee for the debts of the company. It was first hypothecated, and afterwards, as it is claimed, assigned to trustees, for the benefit of creditors, neither assignee taking a transfer upon the books of the company, or causing themselves to be registered as stockholders. The transferees never became liable for the debts of the company. (*Laws of* 1848, *p.* 58, § 16.) If the plaintiff is exempt, therefore, there is no personal liability, as it respects this stock, which would be unjust to creditors and other stockholders of the company, and a fraud upon the law.

Judgment must be for the defendants."

The plaintiff appealed to the general term.

A. Spaulding, for the appellant.

A. Wright, jun. for the respondents.

Geo. G. Barnard, J. I think this judgment should be affirmed. None of the transfers have the effect of relieving the plaintiff from his liability upon the demand in suit. Consequently, the cases of *Bailey et al.* v. *Bancker*, (3 *Hill*, 188,) and *Andrews* v. *Murray*, (33 *Barb.* 354,) are direct authorities against a recovery by the plaintiff, in this action.

Leonard, J. concurred in affirming the judgment, on the ground that no new party had become liable on the stock of the plaintiff, in respect of the plaintiff's demand.

Sutherland, J. dissenting. My high respect for the judicial discrimination and learning of the judge who tried this case, at the circuit, has induced me to give the case a very

careful examination, before coming to the conclusion, that the complaint should not have been dismissed on either of the grounds stated in the opinion of the learned judge; but after such examination I can not avoid the conclusion that the complaint was inadvertently dismissed on either of such grounds.

It may be conceded, that *Bailey* v. *Bancker*, (3 *Hill*, 188,) and *Andrews* v. *Murray*, (33 *Barb.* 354,) establish the rule stated by the judge, that "an action will not lie by one stockholder against a fellow stockholder, to enforce a personal liability for a debt of the company;" and it may be also conceded that *Adderly* v. *Storm*, (6 *Hill*, 624,) *In Re. Empire City Bank*, (18 *N. Y. Rep.* 199,) and the other cases cited by the judge, settle or establish the other rule or principle stated by him, that the *statutory liability* of a stockholder rests upon or attaches to the *registered* owner of the stock, no matter who has the equitable interest or ownership; but does it follow, though the plaintiff, long before this action was commenced, had, by assignments, transferred all his stock, so that, at least as between him and the assignees, he had no stock when the action was commenced, that he could not maintain this action, *because* the stock which he had so assigned *had not been transferred on the books of the company?* In other words, if it be conceded that the *statutory liability* remained upon or attached to the plaintiff, as the *registered owner* of the stock, when the action was commenced, does it follow that his complaint was properly dismissed *because he was a stockholder*, though it appeared, and was conceded, that long before the action was commenced he had transferred all his stock, so that, as between him and his transferees, the equitable title and ownership of the stock was in them, and not in him, when the action was commenced, and at the time of the trial? I think not.

It may be, that as between the plaintiff and the corporation, the assignments did not transfer or pass his stock, so as to affect any lien of the corporation on the stock, for a lia-

bility to the corporation. (*See Sec. 5 of By-Laws, and Leggett* v. *Bank of Sing Sing*, 24 *N. Y. Rep.* 283.) And, as I have said, it may be conceded that, as between the plaintiff and a creditor of the corporation, the plaintiff, notwithstanding the assignments, remained liable as a stockholder, because his stock had not been transferred on the books of the company. But considering that the plaintiff *brings this action to enforce a statutory liability*, I think the assignments protected him from the application of the technical rule or principle that one stockholder can not sue another stockholder of the same corporation. There is really no reason for applying this rule in the plaintiff's case.

I think, notwithstanding the by-law, that the case shows that the plaintiff had transferred all his stock, so as to render it unreasonable to apply, in his case, the rules or principles of law upon which his complaint was dismissed.

I think there should be a new trial, with costs to abide the event of the action.

Judgment affirmed.

[New York General Term, November 7, 1864. *Leonard, Geo. G. Barnard* and *Sutherland*, Justices.]

43 168
38a 451

The People, *ex rel.* Roberts, *vs.* Matthews.

The affidavit which is the foundation of "summary proceedings to recover the possession of lands" should make out a plain case, and should not be uncertain, or contradictory.

If it shows neither the relation of landlord and tenant, nor that any particularly specified term of the defendant has expired, the summons will be unauthorized, and all subsequent proceedings void.

Where an affidavit of the service of the summons stated that the service was made "by leaving a true copy of the same with a person who said he belonged there, at *his* last or usual place of residence, with a person of mature age, who, at the time of said service, was on said premises and resided thereon, said tenant being then absent from his last or usual place of busi-

ness;" *Held*, that the affidavit was defective, as not showing that the copy was left with a person of mature age at the last or usual place of residence of *the tenant*.

CERTIORARI, to remove summary proceedings taken before a justice of the district court in the city of New York, to recover the possession of lands. The affidavit upon which the proceedings were instituted was as follows:

"City and county of New York, ss. Gilbert H. Comstock being duly sworn says, that he is the agent for Edward Matthews, who is the landlord of premises No. 80 Broadway, in respect to the premises now in the occupation of the said Sidney D. Roberts, in the city of New York, and described as follows, to wit: all that building situated at No. 80 Broadway, in the city of New York. And this deponent further saith, that on or about the first day of May, 1863, the said premises were leased to the said Roberts, by Walter L. Cutting, then owner of said premises; that said premises were afterwards purchased by one Edward Matthews, the present landlord and owner thereof, for the term of one year, commencing on the first day of May, 1863, and ending on the first day of May, 1864, which said term has expired; and that the said Sidney D. Roberts holds over and continues in possession of the said premises, without the permission of the landlord, after the expiration of his said term therein."

Upon presenting this affidavit, a summons was issued, by the justice, requiring the alleged tenant to show cause before him, on the 6th of May, 1864, why the possession of the premises should not be delivered to Matthews. Upon proof, by affidavit, of the service of this summons, the justice rendered a judgment in favor of the landlord, for the possession of the premises, by reason of the non-payment of rent; and that a warrant issue to remove the tenant, and to put the landlord in possession. Such warrant was accordingly issued, and duly executed.

The petition for the writ of certiorari alleged, that the proceedings were fraudulent, irregular, erroneous and void, for

the following reasons: *First.* That the petitioner was entitled to the possession of the premises, under the lease above mentioned, until the first day of May, 1865. *Second.* That the affidavit presented to the justice, and on which he issued the summons, was fraudulently and cunningly worded, and altered so as to deceive the justice, and did not present to the said justice a case for the issuing of said summons. *Third.* That no legal service was ever made of the summons, and that the affidavit of service of the said summons did not show any sufficient legal service of the summons on the petitioner, and did not confer jurisdiction on the justice to issue the warrant thereupon issued by him.

Nelson J. Waterbury, for the relator.

E. Pierrepont, for the respondent.

SUTHERLAND, J. The affidavit on which the summons was issued did not show, or state facts to show, that the relation of landlord and tenant existed between Matthews and Roberts. It is difficult to make sense of the affidavit, but the only reading it is susceptible of, is to the effect that, about the 1st of May, 1863, Walter L. Cutting, then owner of the premises, leased them to Roberts, (without stating any term;) that afterwards, Matthews purchased them for the term of one year, commencing on the 1st day of May, 1863, and ending on the 1st day of May, 1864, which term had expired, and that Roberts holds over, &c. without the permission of his landlord, after the expiration "of his said term therein."

I know that bad grammar merely, does not vitiate a written instrument; but a court has no right to transpose sentences, or parts of a sentence, or open a sentence and take out of its middle a portion of it, and put it on to either end, or in a different position, so as to give the instrument or the sentence a different meaning from that which it had when made, or when presented to the court.

The affidavit showing neither the relation of landlord and tenant, nor that any particularly specified term of Roberts had expired, the summons was unauthorized, and all subsequent proceedings were void.

The affidavit which is the foundation of the "summary proceeding to recover the possession of lands," should not be uncertain, or contradictory. (*Wiggin* v. *Woodruff*, 16 *Barb.* 474.) The preliminary affidavit should make out a plain case. (*Hill* v. *Stocking*, 6 *Hill*, 317.) In this last case Judge Bronson says, at the conclusion of his opinion: "These proceedings must be carefully watched, or they will be turned into the means of working injustice and oppression."

Again: I think the affidavit of the service of the summons was defective. The affidavit states that the service was made on Roberts by leaving a true copy of the same with a person who said he belonged there, at *his* last or usual place of residence, with a person of mature age, who, at the time of the said service, was on said premises and resided thereon, said tenant being then absent from his last or usual place of business." I have more doubt on this point, but upon the whole, I do not think it would be safe to hold that the affidavit shows that the copy was left with a person of mature age at the last or usual place of residence *of Roberts*. (*See Cameron* v. *McDonald*, 1 *Hill*, 512.)

I think the summary proceedings should be reversed.

It not appearing, from the return, that Roberts held for any particular term, or that his term has expired, I think restitution should also be awarded to the relator with costs.

Leonard, J. concurred.

Geo. G. Barnard, J. I think the landlord's affidavit insufficient. On this ground I concur.

Proceedings reversed.

[New York General Term, November 7, 1864. *Leonard, Geo. G. Barnard,* and *Sutherland* Justices.]

43 172
66 451
88a 477

Emily Martin and others *vs.* Andrew Martin, executor &c., impleaded with Lynch, executor.

A testator devised and bequeathed the residue of his estate, real and personal, to his five children, to be equally divided between them, share and share alike; the shares of such as were females to be held and enjoyed by them respectively as separate estates, with power to sell and dispose of the same as if sole; and he authorized his executors to sell and dispose of all his real estate, either at public auction or by private contract, on such terms as they should think proper; and until such sale to let or lease the same, and receive the rents or income thereof; to keep the buildings in repair; and in case of loss or damage by fire, to apply the insurance money to the rebuilding or repairing of the buildings.

Held, 1. That there was no express devise of the real estate to the executors.

2. That it was not necessary to hold that the executors took any estate in the lands; inasmuch as all the duties imposed upon them by the will — such as selling or leasing the lands, receiving the rents, repairing or rebuilding — could be performed by them under the authority conferred by the will, treated as a power in trust merely.

3. That the testator did not contemplate any trust; there being no sufficient object for a trust indicated.

4. That whether the testator intended to vest the estate in trust, or to create a power in trust for its management, it would operate only upon the shares of such of his children as were infants, at the time of his death, and would continue only, as to each share, during the infancy of the children respectively.

Where executors have the power to sell the shares of infant devisees under the directions of the will, a court of equity has the power to control its exercise, when a sale is manifestly opposed to the interest of the devisee.

A judge, acting as *parens patriæ*, can determine, from the facts proven, whether it is for the interest of the infant that his real estate shall be converted into *currency*.

APPEAL from a judgment ordered at a special term, on a trial before the court without a jury. The complaint was filed by the five children of Thomas Martin, deceased, against his executors, Andrew Martin and Peter Lynch, to obtain a judicial construction of the will of the deceased, particularly the fourth section. The testator, by the first clause of his will, gave an annuity of $500 to his mother, and after her death the real estate set apart for the purpose of producing such annuity was devised to the same persons, and in like shares or proportions as was afterwards directed with

respect to the residuary estate. The 2d, 3d and 4th clauses of the will were as follows:

"*Second.* I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal, as well that which I now have as that which I may hereafter acquire, and die seised or possessed of, or entitled to, unto my five children, Rosina, Catharine, Emily, Frances and Thomas, to be equally divided between them, share and share alike. If either of them, my said children, shall die before me, leaving issue, I devise and bequeath the part or share given to him or her so dying, unto his or her issue. If, however, either of them, my said children, shall die before me without leaving any issue surviving me, then my will is, and I do hereby direct, that the part or share of my said estate, given to him or her so dying, without leaving issue, shall go to the survivor or survivors of them, my said children, and the lawful issue of such of them as shall die before me, leaving issue, such issue to take the part or share his, her or their parent or parents would have been entitled to if living.

Third. It is further my will that the several shares and portions of my estate which shall be taken by females, shall be held and enjoyed by them respectively as separate estates, free from the control or interference, and not subject to the debts or engagements of any husband, with power to sell and dispose of the same in the same manner, and with like effect, as if respectively sole and not married.

Fourth. I do hereby authorize my executors hereafter named, or such of them as shall qualify and take upon themselves or himself the execution of this my will, and the survivor and survivors of them, to sell and dispose of all my real estate, either at public auction or by private contract, at such time and on such terms, either for cash or part cash, and part on bond and mortgage, as my said executors, or the survivors of them, shall think proper, and until such sale to let or lease the same for one or more years, and receive the rents and income thereof; and out of such rents or in-

come, to keep the buildings thereon in repair, and also in sured against loss or damage by fire; and in the event of any loss or damage by fire, with the money recovered on any policy of insurance, or with any other moneys belonging to my estate, to rebuild or repair such buildings."

The testator appointed Andrew Martin, Thomas Martin and Peter Lynch executors of his will. The will was dated April 16, 1859; the testator died August 12, 1862; and the will was admitted to probate September 16, 1862, and letters testamentary were issued to the defendants.

The complaint averred that the testator left a large real and personal estate, and that his debts were comparatively small, so that they could be discharged out of the personal estate; that all the debts have been paid out of the proceeds of the personal estate; that the estate is worth over $200,000, and it consists chiefly of tenement houses; that the collection of the rents is very precarious; that the houses are continually requiring repairs, and large amounts of money are continually required to pay for repairs, taxes and insurance. That the plaintiffs had agreed among themselves to collect the rents with the assent of Peter Lynch, one of the executors, but that Andrew Martin denied their right so to do; that the other executor admitted their right to collect the rents. They insisted that the will conferred on the executors no legal or valid power in respect to the real estate, and that, even if there was a valid power, under the circumstances it was extinguished. The plaintiffs demanded judgment, that it might be adjudged that the plaintiffs are the owners in fee simple of the real estate of which the testator died intestate, and that, under the will of the said testator, the executors thereof took no estate or interest therein, and have no right or authority to enter into or upon the same, or to convey, let or lease the same, or to collect the rents, issues and profits thereof, hereafter to accrue and become due since the death of the testator, and from interfering with or exercising any control over the said real estate, or hindering, obstruct-

ing or interfering with the tenants of the premises, or with these plaintiffs, or either of them, in the use, occupation and enjoyment of the said premises, or the receipt or collection of the rents thereof. And that if it should appear to the court that a valid power was created by the said will, and conferred upon the executors, then that the said power might, by the judgment of this court, be extinguished, and that an injunction to the effect before mentioned might be issued during the pendency of this litigation; and that if necessary, a receiver might be appointed of the said real and leasehold estate, and that the defendant Andrew Martin might be removed from his office as one of the executors of said will; and for general relief.

The answer of the defendant Andrew Martin, executor, &c., alleged that he was one of the executors of the will; that there were debts existing against the estate; that a large amount of debts were outstanding against the estate; that no inventory at the time of the answer was filed by the executor Lynch, (who had usurped all the authority of the executors;) that he had no notice or knowledge of the intention of the plaintiffs to take the real estate *in specie*, or that they had so stated before the commencement of the action; that no such election could have been made, as Thomas Martin, one of the parties to the election, was and is a minor, and incapable of making such election; and the defendant denied, on information and belief, that Lynch, his co-executor, had acceded to the justice of the claim of the plaintiffs. The defendant insisted, that the proof showed that no inventory was filed until after the answer was put in; that there are supposed claims to about $30,000; that the advertisement for claims against the estate was not published until the month of March, 1863, (but a few months before the trial.) No answer was put in by the defendant Lynch A receiver was appointed, on motion of the defendant Martin.

On the trial of the cause, the plaintiffs abandoned that

part of the complaint in which they prayed for the removal of the defendant Andrew Martin.

The following facts were found by the justice before whom the action was tried, viz: That, at the time of the execution of the will, the wife of the testator was dead, and that his mother, who was then living, died before him, and that at the death of the testator he left him surviving the plaintiffs, who were his only children and heirs at law. That at the date and execution of the said will, three of the plaintiffs, Thomas, Emily and Frances, were infants, under the age of twenty-one years, and that all of the plaintiffs were of full age at the death of the testator, except Thomas, who would attain his majority on the — day of August, 1863. That the testator died seised in fee of a large real estate situate in the city of New York, consisting of houses and lots of land, which then was, and still is, of the value of about one hundred and seventy-five thousand dollars; and that he also died possessed of a leasehold estate or interest in certain premises situated at the corner of Oak and Catharine streets, in said city, for a term of years which will expire on the first day of May, 1884; and that he also died possessed of a leasehold estate or interest in certain premises on the corner of Baxter and Canal (late Walker) streets, in said city, for a term of years which will expire on the first day of May, 1867, and that such leasehold estate or interests were at the time of the death of the testator, and still are, together, worth about the sum of thirty-eight thousand dollars; and that, in addition to the above, the testator left personal property of about the value of sixteen thousand dollars. That the total amount of the indebtedness of the testator which has come to the knowledge of the executors will not exceed twelve thousand dollars, all of which has been paid, with the exception of claims to an amount *less than one thousand dollars, the justice of which was disputed.* That the assets in the hands of the executors, including the said leasehold estates or interests, will be ample and more than sufficient to pay all

the debts of the testator, and that it will not be necessary to sell any part or portion of the real estate of which the testator died seised in fee, for the purpose of paying such debts. That the real estate of which the testator died seised in fee yields an average annual net income of about ten per cent, and that the leasehold premises yield an average net income of about the same per cent, and that irrespective of the power given by the will to the executors, to sell all the testator's real estate, there is not now any apparent reason why the real estate of which the testator died seised in fee, or any part thereof, should be sold. That the interest of the plaintiffs, severally, will be promoted by permitting them to take and hold the real estate of which the testator died seised in fee, in specie, without any exercise in respect thereto of the power of sale in the will. That from and after the death of the testator, until a receiver was appointed in this action, the plaintiffs collected and received the rents, issues and profits of the said real estate, of which the testator died seised in fee. That the executors have not sold or disposed of the real estate of which the testator died seised or possessed, or any part thereof. That the plaintiffs are, and each of them is, desirous of taking said real estate, of which the testator died seised in fee, in specie, and have declared their election so to do. That the defendant Andrew Martin, as one of the executors named in the will, claimed and insisted, as in the complaint alleged, that the said real estate was in and by said will devised to the executors, and that they had the right to let or lease the same, and to collect the rents thereof, and to sell the same, and that the plaintiffs had no right to collect or receive the rents of the said real estate. That the exercise of the power of sale given by the will to the executors was not necessary or expedient, in respect to the real estate of which the testator died seised in fee; that if such real estate, or any part thereof, should be sold and conveyed by the executors under said power of sale, such sale and conveyance

would and must be apparently for the mere purpose of paying over the purchase or consideration money to the plaintiffs.

His conclusions of law were: *First.* That there is in the will no devise to the executors, expressed or *implied.* That the testator's estate in the lands of which he died seised in fee, on his death, did not vest in his executors, but in the plaintiffs, under the direct devise to them in the will. *Second.* That the power given, in the fourth clause of the will, to the executors, to let or lease the testator's real estate, and receive the rents or income thereof, and out of such rents or income to keep the buildings in repair and insured, until such real estate should be sold by the executors, was and is merely subsidiary to the principal power of sale given in the same clause to the executors. *Third.* That such power of sale was and is valid; but that the plaintiffs, under the circumstances, had the right to elect to take the lands of which the testator died seised in fee, in *specie.* *Fourth.* That the court can and ought to give force and effect to such election, as to the infant plaintiff, Thomas Martin. *Fifth.* That upon such an election, the power of sale as to such lands *failed.* *Sixth.* The purpose of the power of sale as to such lands having thus failed, the defendants, the executors, should be perpetually enjoined and restrained from exercising such power of sale as to such lands, and from letting or leasing the same, or any part thereof, and from interfering in any manner with the plaintiffs' possession thereof, or with the plaintiffs' right to collect and receive and enjoy the rents, issues and profits thereof. *Seventh.* That the plaintiffs were entitled to the moneys collected and received by the receiver in this action, and the receiver should render his accounts to the court, and pay over such moneys to the plaintiffs in this action. *Eighth.* That the plaintiffs were entitled to a judgment in accordance with these conclusions of law.

John McKeon, for the appellant. The court, in finding the facts, erred in the following particulars: That the per-

sonal estate was sufficient to pay all indebtedness. The examination of Lynch, one of the executors, shows that the leasehold estate was worth about $30,000, while the proof shows there was a claim for $30,000 of which Lynch, the co-executor, had heard, and not of other claims in reference to which he was questioned, but knew nothing. It was shown that advertisements for claims were never made until March 24, 1863, several months after the complaint was served. It also appeared that, at the time of the trial and judgment, Thomas Martin was still a minor. The main difference between the plaintiffs and defendant Martin is, whether the executors took a legal estate in the lands; whether there was a trust for specific purposes, some of which remain unfulfilled; or whether there was a simple power of sale which has failed, as the object of the power had been fulfilled.

I. The defendant Andrew Martin, executor, insists that the executors took a legal estate in the lands; that there was a *trust* under the will conferred on the executors, for specific purposes. (1.) To set apart certain houses or leases, and out of the rent to pay testator's mother $500 annually during her life, and to pay the surplus of the rent of said house, and divide it amongst his children. (2.) To sell and dispose of his real estate, either at auction or private sale, and to take part cash, or part bond and mortgage, as they shall think proper. (3.) And until such sale, to let or lease the same, and to receive the rents, and out of such rents to keep the buildings in repair and insured against loss by fire; and in the event of receiving money from insurance, with it to build and repair such buildings. The defendant Martin insists that the executors took more than mere power; that there was a trust or confidence conferred on the executors. The disposition of a trust is a confidence, an obligation, a duty arising out of confidence to apply property faithfully, according to such confidence. (*Burrill's Law Dict. tit. Trust.*) No formal words are necessary to make a trust; any words

showing that the testator placed confidence in the executor that he would dispose of *certain rents* for certain purposes will create a trust. (4 *Kent's Com.* 305.) Trustees empowered to receive rents and apply them to the use of a person for life, take an estate for life. (2 *Barb. S. C. R.* 53.) A valid trust as to real property vests the legal estate in the trustees, and is continued in them so long as *any of the purposes of the trust* remain unexecuted, and the *cestui que trust* can take no estate in the land during the continuance of the trust. (2 *Barb. Ch.* 229.) This is not a *mere power* under the will. *Power* is an authority distinguished from an *estate.* This will gives an estate to the executors, as the executors can not only sell but lease, to effect *certain purposes.* It is a *trust.* Where something is to be done which makes it necessary for the executors or trustees to have the legal estate, such as the payment of the rents and profits to another's separate use, or of debts of the testator, or to pay rates or taxes, or to *keep the premises in repair or the like*, the *legal estate is vested in them*, and the grantee or devisee has only a trust estate. (2 *Black. Com. by Sharswood, in notes*, 335; *citing* 3 *Bos. & Pul.* 178, 179; 2 *Term R.* 444; 6 *id.* 213; 8 *East*, 248; 12 *id.* 415.) Suppose in this case the building should be destroyed by fire, who could execute the trust as to repairing buildings, except the executors named in the will?

II. A mere power would not carry out the views and purposes of the testator. The trust imposed in the executors to lease could not be carried out under a mere power. The case of *Brewster* v. *Striker*, (2 *N. Y. R.* 33, 34, *per Jones, J.*) sustains this doctrine. In that case the devise was made to certain parties (named) as in this present case, and yet the court held that there was a trust.

III. The cases cited by the court below, showing that the power under the will has failed, do not cover the present case. In *Jackson* v. *Jansen*, (6 *John.* 73,) the court decided that the power to sell failed, by the death of the widow happening

before a sale was made. It was for her *sole* benefit that the power was created. In the present case the will has several objects in view, and particularly the keeping in repair and insuring the houses during the minority of the children of the testator. In *Sharpsteen* v. *Tillou*, (3 *Cowen*, 651,) the court put their decision on the ground that the *objects* of the testator having been in a great measure *defeated*, and his *intentions* in giving the power *frustrated*, the *power* itself granted by the will *failed*, and a sale was void, so far as it depended on the power. In the present case, the *intentions* and *objects* of the testator still remain to be carried out. Under these very cases, the rule deduced from them is, that the purposes of a testator in giving a power by his will must be ascertained from *all* the provisions of the will, and the *objects* of the power must be considered in *connection* with the *power itself*. Even under this rule the power has not failed, as *some* of the provisions of the will in connection with the power still remain to be executed. The court had no power to make election for an infant; the court erred in allowing his declaration to be admitted in evidence. If the court was to be governed by the wishes of the infant, it should have referred it to a referee, to inquire whether his interests would be promoted by taking the land in specie, and whether he made the election voluntarily. The power of a court to make a selection for an infant, as taking real estate in specie, is also questioned. The power of a court of chancery to protect the rights of an infant from adverse interests (as *parens patriæ*) was questioned for a long time. To select estate in *specie* is, in fact, making an agreement or contract for an infant, of the highest character for the infant; and the court should hesitate to make such selection or agreement, as the infant's agreements would be voidable at his pleasure, on his arriving of age. (2 *Story's Eq.* 1334, 1337.)

IV. By the court interfering with the executors, the whole management of the estate will be in violation of the provisions of the will, and the estate may be thrown into confusion.

As the will is interpreted by the plaintiffs, the executors have a simple power, but the power can not be executed by one of the parties; an infant, as an infant, *can not execute a power*. An infant's disability arises not from want of reason, but from want of capacity. In a case where an infant was 17 years of age, it was insisted that the infant was then as discreet as if he was 21 years of age, and the court might judge whether or not the infant had discretion to execute a power. "This," says Lord Hardwick, "is of such latitude and extent, that I own that I should be very sorry as presiding in a court of justice to be entrusted with it, for there is a variety of opinions of people's judgments." (*Macpherson on Infants*, 92, 93, 95. 1 *Ves.* 298, 306.) The evidence shows that no advertisement had been made for creditors until March, 1863, and that since Lynch, the executor, advertised, he has heard of a claim of $30,000. Is it not safer to allow the regular time to elapse for claims before this court will interfere.

V. The only safe course for the court is to dismiss the complaint, as an infant is concerned, on the following grounds: (1.) That the infant was within a few months of being of age, when the estate could be properly and easily settled and without question. (2.) That the executors now acting are not charged with insolvency or impropriety of conduct as guardians. (3.) That the will gives full authority to lease for one or more years. (4.) That the interests of all parties are, for the present, in a receiver's hands, where they can remain with safety for a few months. (5.) That it is evident that the proceeding is, in fact, a conspiracy between the plaintiffs, one of whom is a minor, and one of the defendants, the co-executor of the defendant Martin, to remove a co-executor from the discharge of his duties as executor.

VI. If the court should determine in favor of the plaintiffs, the costs and expenses of the defendant Martin should be paid out of the estate. The proof does not show that the executor Martin ever was asked to deliver the estate in specie,

or that it was ever demanded by the plaintiffs, until the filing of the complaint. The good faith of the co-executor Martin can not be questioned.

John E. Burrill, for the respondents. I. By the second clause of the will, all the real estate of the testator is devised to his children, and they took an estate in fee thereunder.

II. The executors took no estate in the land, but at the utmost had a mere power of sale. 1. There is no devise to the executors, either express or implied, but, on the contrary, there is a direct and express devise of the real estate to the children. 2. The purposes for which the executors are directed to receive the rents and income, viz. to insure, repair and rebuild, are not such as would support a trust to receive rents and profits under the 55th section of the statute, which provides that express trusts to receive rents and profits are valid only when such rents and profits are to be applied to the use of some person during life, &c. 3. Nor does the direction to sell the land create a valid trust, because, by the same section, such trusts are sustained only when the sale is to be made for the benefit of legatees, or to satisfy some charge upon the land. (2 *R. S.* 137, § 55, *4th ed.* 1 *id.* 728, § 55, *2d ed.* 2 *id.* 140, §§ 68, 70, 71, *4th ed.* 1 *id.* 729, §§ 56, 58, 59, *2d ed.*)

III. Conceding that the executors have a power to sell, then, 1. The estate vests in the children, subject to the exercise of the power. (2 *R. R.* 140, §§ 68, 70, 71, *4th ed.* 1 *id.* 729, §§ 56, 58, 59, *2d ed.*) 2. The children are entitled to the proceeds of the sale, if the power be exercised, and, if they choose, may elect to take the estate in specie. 3. Even though the power be imperative, (which may well be doubted,) inasmuch as the object which the execution of the power was intended to secure has failed, and no longer exists, and the power has become purposeless, its exercise should be restrained, and especially so when it will work a positive injury to

those for whose benefit it was intended. (*Jackson* v. *Jansen*, 6 *John.* 81. *Sharpsteen* v. *Tillou*, 3 *Cowen*, 659.)

IV. The court was right in acting upon the election of Thomas Martin. 1. Thomas, being an infant, had a right to call upon the judge in equity, as *parens patriæ*, to elect for him, and give effect to his reasonable wishes. 2. Though an infant in law, Thomas was a full grown adult, just on the verge of majority, and his wishes were entitled to greater and different consideration than if he were a person of tender years. 3. The testator had confidence in his judgment and discretion, as was exhibited by his appointment as guardian and executor.

V. Since Thomas came of age he has ratified the election made before he attained his majority, and has sanctioned the action of the court in his behalf.

By the Court, LEONARD, J. There is clearly no express devise of the landed estate of the testator to his executors. A devise of an estate in lands has been implied when acts and duties to be performed under the express directions of the will would otherwise fail; and in such a case it has been held that the intention of the testator to devise the estate to trustees is manifested, and that they take the title by implication.

In the present case it does not appear to be necessary to hold that the executors take any estate in the lands. They are authorized to sell, lease, receive rents, repair, and in case of loss or damage by fire, to apply the insurance money to rebuilding. All of these duties can be performed by the executors under the authority conferred by the will, treated as a power in trust merely.

The testator did not contemplate any trust. This is clear from the fact that no application is made by the provisions of the will in respect to the large fund which would necessarily accumulate in their hands from income. The direc-

tions contained in the will would apparently absorb but a small portion of the income. A trust is created, usually, for some express object; and is to be continued only till that object is attained, or the period limited therefor has expired. Here there is no object for a trust indicated, unless it be supposed that repairing the property is sufficient.

But whether the testator intended to vest the estate in trust, or to create a power in trust for its management, it will operate only upon the shares of such of his children as were infants at the time of his death, and continue only as to each share during the infancy of the children respectively. By the second section of his will his whole estate passed to his children at the death of the testator. It would be inconsistent with this provision to hold that the title to any part of the estate was vested in trustees, and equally inconsistent with their rights as owners for the executors to exercise a power to sell, &c. after the children had reached their majority, except for the purpose of paying debts.

The judge has found that there are no debts, except a very small amount, not equal to the amount of personal property. This fact seems to be sustained by the evidence. It is true, one of the witnesses had heard of a large claim, but its existence as a debt was not proved. Under such circumstances it can not be doubted that the children had a right to take and hold the land.

The testator appointed his executors the guardians of his minor children, and I think he intended them to act for their interest in selling the land, combining the exercise of the power to sell with their duty as guardians. All the children had, however, reached their majority before the testator died, excepting only his son Thomas. When this action was commenced, Thomas was over twenty years of age, and at the trial he wanted some three months only of his majority.

It appears to be pretty clear that the defendants, Andrew Martin and Peter Lynch, were not guardians of Thomas

Martin; for the same clause of the will which appoints Andrew and Peter guardians, also appoints Thomas a guardian over himself. As to Thomas Martin, the guardianship was inoperative under this provision.

But assuming that Andrew Martin had the power to sell the share of Thomas under the directions of the will, the court has the power to control its exercise when a sale is manifestly opposed to the interest of Thomas.

The judge at special term acting as *parens patriæ*, could determine from the facts proven whether it was for the interest of the infant that his real estate should be converted into *currency*. Why, it might be well asked, could Andrew Martin choose for the infant in this respect better than the judge? Has he more intelligence? Is he more disinterested? It can not be doubted that the property of an infant in 1863 was safer, invested in land, than it would be if exchanged for the currency then in use.

Whatever may be the answer to these questions, it is of very little practical importance to reverse the decision even if it could lawfully be done, as all the children, including Thomas, are now of age, and the executors can no longer exercise the power of sale under the will.

The exceptions taken to the refusal of the judge to admit evidence as to the habits of Thomas Martin in respect to temperance, are of no moment, as the evidence was immaterial.

The objection as to the admission of the written statement of the wishes of Thomas Martin, in respect to the sale of the real estate, is not well taken. No argument can be urged against its admission, except its want of materiality. If the evidence had been excluded, it does not appear that the judge could have arrived at any other decision of the case.

The only conclusion to be drawn from the statement is, that Thomas thought very much as the judge did. As evidence, the statement had no operation.

Probably the defendants acted honestly in their wish to

sell; and in defending this action I think their costs should be allowed them out of the fund.

The judgment should be affirmed, and the costs of both parties on the appeal paid from the estate.

[New York General Term, November 7, 1864. *Leonard, Geo. G. Barnard* and *Sutherland*, Justices.]

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59 524
42a 132

Smith and others *vs.* Orser, Sheriff &c.

To render a seizure of property under process effectual, it must be accompanied by possession. The sheriff must not only seize, but he must take the property attached into his custody. In case of neglect to perform his duty in this respect, the sheriff is subjected to personal responsibility.

Upon an attachment being issued against one or more members of a firm, the sheriff must proceed to serve it upon the interest of the defendants in the attachment in property owned by them jointly with others, in the same manner that he is required to do under an execution.

The decision in *Goll* v. *Hinton* (8 *Abb. Pr. Rep.* 120) approved.

A sheriff is not responsible for such acts as the law requires him to perform. He could not execute the commands of process, either in the case of an execution or an attachment, without taking the manual possession of the property which he is required to seize.

An action will not lie against a sheriff, as a wrongdoer, by all the members of a firm, a part of whom are the defendants in an attachment, on the ground that upon such attachment he has seized and taken into his custody property belonging to the plaintiffs collectively, as a partnership.

Counts for detaining the plaintiffs' property, and for wrongfully and negligently injuring it while in the defendant's possession as sheriff, may be joined in the same complaint, where they arise out of the same transaction. If they do not, the defendant's remedy is to demur, and if he fails to do so, he waives the objection.

Inasmuch as the law requires the sheriff, upon an attachment, to take the property into his custody, the spirit of section 207, sub. 4, of the code must be considered to forbid the use of the provisional remedy for the claim and delivery of personal property in such a case, notwithstanding the attachment upon which the property was taken was not against *the plaintiffs*, literally, but only against *some of them*.

Smith *v.* Orser.

THIS case is presented on exceptions taken on behalf of the defendant, ordered to be heard in the first instance at the general term, and on an appeal from an order denying *pro forma* a motion for a new trial on the minutes of the circuit judge, on the exceptions, and upon the ground of insufficient evidence and excessive damages. The plaintiffs sued to recover possession of horses and street sweeping machines, &c., and to recover special as well as general damages for the detention of the property, and for injuries done thereto wrongfully and negligently. The answer put in issue the wrongful detention, the time, and all other allegations of the complaint, relating to damage to the property, or negligence, or the conversion of any part of it, and justified the detention under various warrants of attachment, issued out of the supreme court, against the property of Smith, Seckel, Hartman and Hyneman. And the answer averred property, or a leviable interest, in the defendants in the attachment suits, or some of them, and alleged that the transfer of the interest of Seckel in the property, made July 25, 1855, to Altemus, was fraudulent; and claimed a return of the property. On the trial, before Justice DAVIES and a jury, in March, 1858, it appeared that the firm of Smith, Seckel & Co., composed of the plaintiffs Smith and Hyneman, together with A. G. Seckel and John Hartman, jr., was formed in Philadelphia, November, 1854. In May, 1855, Hartman sold out to his copartners, and a bill of sale was, July 25, 1855, executed by Seckel of *his individual* interest to Francis S. Altemus. The consideration of the transfer was mainly the assumption of some of Seckel's individual debts. Immediately upon this purchase a new firm of Smith, Altemus & Co. was advertised; Altemus in all respects assuming the place of Seckel. At this time Seckel could not pay his debts, and his interest had been attached by the defendant, at the suit of Curtis, but the possession of the property was not interfered with until August 2d, when the sheriff also had an attachment against the property of the other members of the

firm, at the suit of Buckingham. In May, 1855, Smith, Seckel & Co. had become indebted to Mr. Buckingham in an amount over $5000, which became due on the 24th day of July, 1855, and on the attachment being issued, August 1, on that debt, against Smith, Seckel & Hyneman, the sheriff made his levy and took the custody of the property, and held it until the 6th of September, when it was replevied by the plaintiffs, who composed the new firm of Smith, Altemus & Co. All of the attachments were issued upon debts created before the sale by Seckel to Altemus. Considerable evidence was given upon the question whether the sale of Seckel's interest had not been made with intent to defraud his creditors. At the time the sheriff took possession of the property, and at the time of the commencement of this suit, Smith and Hyneman retained their interest in the property. Much of the testimony given on the trial related to the amount of damages which the plaintiff was entitled to recover for the detention of the property. The court charged the jury, that if they found in favor of the transfer by Seckel to Altemus, they then must consider the actual damage the property sustained by the neglect of the sheriff. The defendant excepted. The jury having found in favor of the plaintiff, on the subject of the transfer, rendered a verdict for detention and damage to the property at $3850, and assessed the value of the whole property at $14,000. Exceptions were, at different stages of the action, taken as to the admissibility of testimony.

A. J. Vanderpoel and *T. Westervelt*, for the appellant.

J. Larocque, for the respondents.

Leonard, J. The warrant of attachment requires the sheriff to attach and safely keep all the property of the defendants therein, or so much as may be necessary to satisfy the demand of the plaintiff, with costs. (*Code*, § 231.)

The sheriff is further required to keep the property seized by him, to answer any judgment which may be obtained in the action. (*Id.* § 232.) The section just cited also requires the sheriff to proceed in the manner directed in cases of attachment against absent debtors. The provisions of the revised statutes on this subject are thereby incorporated into the code.

To render a seizure under process effectual it must be accompanied by possession. The sheriff must not only seize, but he must take the property attached into his custody. In case of neglect to perform his duty in this respect, the sheriff is subjected to personal responsibility.

It is pretty clear from these provisions of the law that upon an attachment against one or more members of a firm, the sheriff must proceed to serve it upon the interest of the defendants in the attachment in property owned by them jointly with others, in the same manner that he is required to do under an execution.

The sheriff is not responsible for such acts as the law requires him to perform. He could not execute the commands of the process, either in the case of an execution or an attachment, without taking the manual possession of the property which he is required to seize. (*Waddell* v. *Cook*, 2 *Hill*, 47, *and the note to that case.*) This principle was decided by this court in the case of *Goll* v. *Hinton*, (8 *Abb. Pr. R.* 120,) and is still the law in this district, so far as I can ascertain. The opinion in *Goll* v. *Hinton* was delivered at general term in this district, by the same learned justice before whom this action was tried at the circuit, a few months after that trial. No doubt he felt himself controlled, at the circuit, by the cases of *Stoutenburgh* v. *Vanderburgh*, and *Sears* v. *Gearn*, (*reported in* 7 *How. Pr. Rep.* 229, 389.) Those cases are referred to in *Goll* v. *Hinton*, and are there expressly overruled.

We are referred to two cases subsequently decided in this district, which, it is supposed, have departed from the rule

held by this court in *Goll* v. *Hinton*, but it will be found on examination that the cases cited, to which I will now refer, have no bearing upon the points here involved. The cases so cited are *Abels* v. *Westervelt*, (15 *Abb. Pr. R.* 230,) and *Askham* v. *Hunt et al.*, manuscript decision, March, 1863, decided in this district, but not reported. In *Abels* v. *Westervelt* it was held, on a motion between two parties claiming to be creditors of a firm, consisting of two members, in respect to the application of a fund held by the sheriff, being the proceeds of partnership property sold by him under execution, that the creditor by execution was entitled to the fund, although only one member of the firm had been served with the process by which the action was commenced, giving the execution creditor a preference over the creditor who had caused the property out of which the fund arose to be seized, on an attachment against one member only of the firm, prior to the issuing of the execution. It was so held because the fund, which was insufficient to satisfy the execution, was not raised by virtue of the attachment, inasmuch as the interest of one member only had been seized on the warrant, and that interest only could be sold in the attachment suit, while on the execution, which ran against all the property of the defendants, the whole interest of both defendants was sold. The attachment was a proceeding *in rem*, and reached only the separate interest of one member of the firm, whatever that might be; while the judgment authorized the sale of the whole interest of both defendants on execution. The equitable doctrine of the application of partnership property to the payment of partnership debts, in preference to the separate obligations of the individual members, was referred to as analogous to, and as supporting the rule there applied.

In *Askham* v. *Hunt* the same equitable rule was recognized, but it was considered that no case was made for its application; and that Miss Chapman, the partner who was alleged to have disposed of the partnership estate for the benefit of her separate creditors, not having been served with

the process by which the original action was commenced wherein the judgment was recovered upon which, after the return of an execution of the limited nature authorized in such cases, unsatisfied, the creditor's bill then before the court had been instituted, could not be assailed in respect to her title to the property in question, or her right to dispose of it as she thought proper; particularly as no fraud was alleged in the transfer to her of the interest of her partner in the property of the partnership; and that the plaintiff, Askham, not having exhausted his remedy at law, had no standing to invoke the equitable cognizance of the court for the purpose of impeaching her title to the property alleged to have formerly belonged to the partnership of which she had been a member.

The principle which underlies this action, viz. whether the sheriff, on an attachment against some of the members of a partnership only, may seize and take into his custody, in the same manner as on an execution, the property of the partnership, consisting also of other members against whom the warrant did not run, was not involved in either of the cases so cited by the learned counsel for these plaintiffs; and of course they can not be considered as impairing the prior authority of *Goll* v. *Hinton*.

In the case now before the court, no question can properly be raised concerning the priority of partnership creditors, in the order of payment, over the creditors of the several members of the plaintiff's firm. (*Phillips* v. *Cook*, 24 *Wend.* 389.) All the members of the plaintiff's firm, part of whom are the defendants in an attachment under which the property in question was seized by the defendant, as sheriff, claim to maintain this action against the sheriff as a wrongdoer, on the ground that he has seized and taken into his custody under the said attachment, which directed him to attach and keep the property of two only of the three members of which the partnership consisted, certain personal property which belonged to the plaintiffs collectively, as a partnership. Clearly

nothing in the two cases which have just been examined has any bearing as authority upon the subject of this action. There is no issue here as to the rights of the creditors of the firm, but only as to the rights of the members to recover for an alleged wrongful taking of their property.

We have already seen that the sheriff was in the lawful pursuit of his duty when he took the property in question into his custody. The judge erred at the trial, in directing the jury that the sheriff had no right, under the attachments, to take or hold the possession of the property.

There are two causes of action specified in the complaint; the first is for detaining the plaintiffs' property; the second for wrongfully and negligently injuring it while in his possession, as sheriff. I see no difficulty in the joinder of the two counts. The two causes of action arise out of the same transaction, I think. If they do not, the defendant should have demurred, and by omitting to do so has waived the question.

Whether the count for detaining personal property can be maintained by these plaintiffs, two of them being defendants in certain of the warrants of attachment under which the defendant justifies his taking and detention of the property, is not so clear.

The plaintiffs demand a recovery of the property, and the defendant by his answer demands its return. It appears that the plaintiffs took the property under the provisional remedy for the claim and delivery of personal property. It is an action in the nature of replevin. The policy of the law forbids that property should be taken from its custody by any of the parties against whom the process in another action is to take effect. The court determines the right to its custody, in the action wherein its custody is held. The code requires the plaintiffs to swear that it has not been taken on execution or attachment against them. (§ 207, *subd.* 4.) Literally speaking, the attachments were not against the *plaintiffs;* but they were against *some of the* plaintiffs, and as the law

required the sheriff to take the property into his custody on the attachments, the spirit of the section of the code above referred to must be considered to forbid the use of this remedy for the claim and delivery of property in such a case. The verdict is peculiar in such actions. (*Code*, § 261.) The jury are required to assess the value of the property, and when the verdict is for the defendant, that he is entitled to a return of it, if by his answer he has claimed its return. In my opinion, the cause of action mentioned in the first count can not be maintained.

The partners who are not debtors in the attachment must seek their remedy in equity. (*Phillips* v. *Cook*, 24 *Wend.* 389.)

Several questions were raised at the trial, as to the admission of evidence, but it is not necessary to examine them, as there must be a new trial for the reasons before given.

There should be a new trial, with costs to abide the event.

SUTHERLAND, J. I concur in the conclusion. *Goll* v. *Hinton* (8 *Abb. Pr. Rep.* 120) is controlling, on one of the main points in the case.

GEO. G. BARNARD, J. concurred in the conclusion.

New trial granted.

[NEW YORK GENERAL TERM, November 7, 1864. *Leonard, Geo. G. Barnard* and *Sutherland*, Justices.]

TAYLOR and others *vs.* HUTTON and others.

Where the articles of association of a National Bank, signed by all the original stockholders, and giving express authority to the directors to remove the president, have been transmitted to the comptroller of the currency, who has, on receiving the same, issued circulating notes to the bank, he will be deemed to have approved of the articles, and the directors will have the power to remove the president, even though the bank has never legally adopted any by-laws.

It is not necessary that any by-laws should be adopted before a president may be chosen or removed, and another appointed in his place.

Section 11 of the act of congress, relative to national banks, authorizes the directors to remove the president of a banking association.

APPLICATION for the continuance of a preliminary injunction. The action was brought by two of the directors and two of the stockholders of the Fourth National Bank, in the city of New York, against the remaining directors, to restrain them from removing the president, Mr George Opdyke, from his office.

D. D. Field, for the plaintiffs.

L. B. Woodruff and *Jos. H. Choate*, for the defendants.

PECKHAM, J. This is substantially an application for the continuance of an injunction to prevent the alleged illegal removal of the president of the fourth national bank, threatened by two thirds of the directors—defendants herein. It is charged in the complaint that the defendants entered into a combination shortly after the election of the president to "drive him from his office with the view of putting a more pliable person in his place, and using the funds of the bank to aid in stock operations, instead of employing them in legitimate commercial and banking operations." The suit is commenced by two of the directors and two stockholders of the bank, the president not being a party. The purpose of the removal is very fully and specifically denied, though the

intent to remove is admitted, and, as the defendants insist, for the true interests of the bank.

It appears from the papers on this motion that from soon after the election of the president on the 19th of January last, until the commencement of this suit, unpleasant difficulties and differences have existed between the president and a majority of the directors, as to the proper officers of the bank, and as to some other matters not material to specify. The directors finally determined to remove him, and it is now insisted that they have no such power. No allusion was made in the complaint, on which the temporary injunction was obtained, to the articles of association of this bank, signed by the stockholders.

The chief ground urged against the authority of the board to remove the president is, that the bank has never legally adopted any by-laws, and that there are none now existing; that they should be adopted by the stockholders and not by the directors, and that they should also be approved by the comptroller of the currency. They have been adopted by the directors only. It is conceded that they have never been adopted by the stockholders, nor in form by the comptroller of the currency. But suppose there are no by-laws yet adopted, I do not think it follows that the directors may not remove the president. The articles of association, signed by all the original stockholders, (in some degree in the nature of a charter,) give express authority to remove. Its sixth article provides that "the board of directors [a majority of whom shall be a quorum to do business] shall elect one of their number to be president, who shall hold his office [unless he should become disqualified or sooner removed by a two thirds vote of all the members of the board] for the term for which he was elected a director." These articles of association, so adopted and signed, are to be, and in this case, from the facts presented, have been transmitted to the comptroller of the currency, who is by law required "to record and carefully preserve the same in his office." (Section 6 of

the act.) He must then, in substance, have approved of them, or he would not have issued the circulating notes to this bank, which he in fact issued under the 16th section of the act.

The act of congress also, in my judgment, authorizes this removal. In speaking of the powers of the directors, as I interpret the act, it says "they shall have power to carry on the business of banking by obtaining and issuing circulating notes in accordance with the provisions of this act, by discounting bills, notes and other evidences of debt, &c. &c.; to choose one of their number as president of such association, and to appoint a cashier and such other officers and agents as their business may require, and to remove such president, cashier, officers and agents at pleasure, and appoint others in their places." (Section 11 of the act.) I think this construction of the act, as having reference to the *directors* to do these things, and not to the *stockholders*, is quite plain.

It does not seem to be at all necessary that any by-laws should be adopted before a president may be chosen or removed, and another appointed in his place. This power is expressly given to the board, irrespective of any by-laws, both by the articles of association and by the act of congress. Besides, it is a power that might be required to be exercised, or that it might be expedient to exercise, prior to the adoption of any by-laws.

It is also insisted that one of the defendants (Mr. Whitewright) is not legally a director, and has no right to unite in the removal. It appears that one of the original directors resigned, and that Mr. Whitewright was appointed to fill the vacancy, by the other members of the board, without any nomination at a prior meeting of the board as required by the by-laws, which, as the plaintiffs allege, were adopted by the board. Here the plaintiffs must invoke the aid of by-laws. The act of congress prescribes that the vacancy in the board shall be filled by appointment by the remaining directors. (Section 43.)

Assuming the plaintiffs to be correct in their position, that

there are no by-laws, there is certainly no objection to the appointment under the statute. Besides, I may add, that the statute seems to require the aid of no by-laws, and that none could be made to annul it.

If the by-laws exist and are valid, I do not think they apply to the appointment of a *director*, though it might have been a sound provision, had it been made. Irrespective of the by-laws and of the articles of association, the board have power, under the act, to remove the president by a mere majority vote; assuming that they modify and qualify the act, a two thirds vote is required.

It is argued that the court should stay the action of the board until the 14th instant, when a meeting of the stockholders will be held and the whole difficulty settled. On mere questions of expediency, of this character, courts have no power to interfere with the action of a bank or its officers.

The preliminary injunction is therefore dissolved, and the motion for its continuance is denied, with costs.

[At Chambers, New York, April 12, 1864, before *Peckham*, Justice.]

West *vs.* McGurn.

Upon an appeal to a county judge from the decision &c. of a jury, certifying to the necessity of a private road, and from an order of commissioners of highways laying out such road, the county judge has authority to dispose of the appeal in the manner prescribed by statute in respect to public roads; which includes the power to appoint referees to hear such appeal.

COMMON law certiorari issued by the supreme court on the application of Robert West, directed to the county judge of Columbia county, to remove into this court proceedings before referees who were appointed by the county judge of Columbia county in relation to laying out a private road

through the lands of said West, upon the application of McGurn and for his benefit. After the application of McGurn, a jury was summoned, who certified the necessity of the road and assessed the damages. Whereupon the commissioners of highways of the town of Canaan, in the said county of Columbia, laid out the road, and filed their order to that effect, on the 5th day of August, 1863. West appealed from the decision &c. of the jury, and the order of the commissioners, to the county judge of Columbia county, who, on the 7th day of October, 1863, appointed three referees to hear such appeal. Upon the application of McGurn the certiorari was allowed by a justice of this court, and in obedience thereto the county judge of Columbia county made a return of the proceedings to this court.

H. N. Wright, for McGurn.

C. L. Beale, for West.

By the Court, INGALLS, J. The important question to be determined is, whether the county judge was authorized to appoint the referees to hear said appeals. And it is a question not without serious difficulty, occasioned by imperfect legislation, which is much to be regretted upon so important a subject.

The constitution of this state provides as follows: "Private roads may be opened *in the manner to be prescribed by law*, but in every case the necessity of the road and the amount of all damages to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited."

In 1853, an act was passed by the legislature, prescribing the manner in which private roads were to be laid out. This court, at general term, in *The People* v. *Robinson*, (29 *Barb.* 77,) decided that there was no appeal from the order of the

commissioners of highways laying out a private road, and that the county judge had no power to appoint referees; which decision was made in 1858. In 1860, the legislature passed an act amending the act of 1853, containing the following provision: "And if any person shall consider himself aggrieved by the decision of the freeholders, either in laying out or closing a road, he may within sixty days after such determination shall have been filed in the office of the town clerk, appeal to the county judge of the county in the same manner as appeals were heretofore allowed to be made to three judges under title 1, article 4, chapter 16, part first of the revised statutes." This provision was in relation to private roads. Pursuant to this statute the appeal in question was brought to the county judge who appointed the referees. No question is raised as to the regularity of the proceedings up to the appointment of the referees. But it is contended on the part of McGurn that the legislature has entirely omitted to prescribe the manner in which the appeal is to be disposed of, and hence the appeal is ineffectual for any purpose; and that the appointment of the referees was without authority and void. While it is not the province of the courts to legislate, it is their duty to so construe a statute as to carry out the intention of the legislature, if possible, without violating a positive law. This is a remedial statute, and as such entitled to a liberal construction. (1 *Kent's Com.* 466.)

Statutes that are remedial, and not penal, are to receive an equitable interpretation, by which the letter of the act is sometimes restrained, and sometimes enlarged, so as more effectually to meet the beneficial end in view, *and prevent the failure of the remedy.* They are to be construed liberally, and *ultra* not *contra* to the strict letter. (*Smith's Com. on Statutes, &c.* § 480. *The People* v. *The Utica Ins Co.*, 15 *John.* 380.) "Such construction ought to be put upon a statute as may *best answer the intention which the makers had in view.* And this intention is sometimes to be *collected*

from the cause or necessity of making the statute, and sometimes from other circumstances; and whenever such intention can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seems contrary to the letter of the statute." "A thing that is within the intention of the maker of a statute is as much within the statute as if it were within the letter. And such construction ought to be put upon it as does not *suffer it to be eluded.*" (*Smith's Com. on Stat. &c.* § 464.) "If there happens to be omitted in a law any thing that is essential to it, or is a necessary consequence of its disposition, and that tends to give the law its entire effect according to its motive, *we may in this case supply what is wanting in the expression, and extend the disposition of the law to what is included within its intention, although not expressed in words.*" (1 *Kent's Com. p.* 463.) "Whenever a power is given by a statute, *every thing necessary to the making it effectual, or requisite to attain the end, is implied.*" (*Id.*) "Several statutes *in pari materia* and relating to the same subject, are to be taken together and compared in the construction of them, because they are considered as having one object in view, and as acting upon one system, and the rule applies, though some of the statutes may have expired and are not referred to in the other acts." (*Smith's Com.* § 338.) "*So too, when one statute was undoubtedly under the consideration of the legislature when passing another*, the former ought, although long since repealed, to be taken into consideration in construing the latter statute, and that for the reason, that it is a rule in the construction of statutes that all which relate to the same subject, notwithstanding some of them may have expired or are not referred to, must be taken *to be one system and* construed consistently, and the practice has always been so." (*Id.* §§ 639, 640.)

I have thus referred to several well established rules which are to be applied in the construction of statutes like the one

under consideration, and by which we must be governed in determining this case. The legislature, by the act of 1860, intended to secure to the party aggrieved a right of appeal to the county judge, and must have intended to vest in the county judge all the power necessary to accomplish the object intended. (1 *Kent's Com. p.* 463.) "Whenever a power is given by a statute, every thing necessary to the making of it effectual or requisite to attain the end, is implied." This court is authorized, in order to effectuate the obvious intention of the legislature, and to render the statute operative in a case like the one under consideration, where the proceeding is to take the property of the party seeking the remedy by appeal, to carry the doctrine of implication to its utmost verge, short of legislating. Title 1, article 4, chapter 16, part 1 of the revised statutes applied as well to private as to public roads, and, as has been seen, the legislature must be presumed to have taken that fact into consideration when the act of 1860 was passed.

By the act of 1847, (*Sess. Laws of* 1847, *p.* 584, § 8,) appeals from the determination of commissioners of highways in laying out or refusing to lay *out any road* are to be made to the county judge instead of the judges of the common pleas. And it will be observed that the same act also contains provisions relative to *private roads.* Section 8, which provides for an appeal to the county judge, uses the words, "any roads;" also in § 9, the same expression occurs; in other parts of the act the word "highway" is used. Without intending to question the correctness of the decision in 29 *Barb.* 77, above referred to, I allude to the above facts for the purpose of showing that the legislature, when they passed the act of 1860, must be presumed to have had in view those various statutes and the provisions above referred to, and evidently intended by the act of 1860, to confer upon the county judge the same powers in regard to the disposal of appeals in reference to private roads as was conferred by the act of 1847, in reference to public roads. The reference to

the revised statutes, in the act of 1860, in regard to the manner of appeal, was for the purpose of brevity; thereby avoiding the insertion of all those provisions in the act of 1860, and with the manner of appeal evidently intended to carry along the same manner of disposing of the appeal as was provided by the act of 1847, in reference to public roads; having in view as well the provision of the act of 1847, as to the appointment of referees, as the provision of the revised statutes as to the mode of appeal. I therefore conclude that the legislature intended that the county judge, having acquired jurisdiction by the appeal, became vested with the same authority to dispose of such appeal in the manner provided in reference to public roads, which includes the power to appoint referees. I think this view is authorized by the rules of construction to which I have referred. And if so, the whole proceeding is harmonious, and the obvious intention of the legislature to secure a perfect appeal and the disposition thereof, is accomplished. Otherwise the act of 1860 is wholly inoperative, and embarrasses rather than aids the party whose rights are sought to be protected.

The writ of certiorari should be superseded, and the referees directed to proceed.

[Albany General Term, December 5, 1864. *Peckham*, *Miller* and *Ingalls*, Justices.]

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DeWitt Parshall *vs.* Seth H. Klinck.

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48b 55

Where, in an action upon a promissory note, the defense was payment, and the defendant, being examined as a witness, testified positively to the payment of the note, and to the particular time, manner and place of payment, and the person to whom made; and the plaintiff, on a motion for a new trial, swore that this testimony took him by surprise; that he did not previously know how, when, or where, it was claimed that the note was paid; and it appearing that to meet and explain such evidence by countervailing

testimony, at the trial, required time, to inspect entries and examine dates, &c.; and that since the trial it had been discovered that three witnesses would contradict the defendant's testimony, as to the fact of payment, on the day and at the place mentioned by him, and would testify to their presence, and to what did take place, on the day and at the place of the alleged payment; *it was held*, that this was a proper case for granting a new trial on the grounds of *surprise* and *newly discovered evidence*.

Held, also, that the evidence offered to be given was material, going to the merits, had been discovered since the former trial, was not cumulative, and there was no laches in not discovering it before.

ACTION upon a guaranty made by the defendant of payment of a promissory note for $200, made by O. K. Klinck, dated February 13, 1861, payable sixty days after the date, and transferred to the plaintiff; also upon an indorsement by the defendant of a note for $175, made by O. K. Klinck, payable to the order of the defendant, and indorsed to the plaintiff. Defense, as to the note of $200, of payment, and an offer of judgment for the amount of the other note, with costs. The action was tried at the April circuit, in 1862, in Wayne county, before Mr. Justice Mason, and a jury. At the trial, Owen K. Klinck, the maker of the note, testified in behalf of the defendant, that on the 19th of April, 1861, he went to the plaintiff's bank a few minutes after bank hours; that he found the outer door open, and went in and found James D. Westfall, teller, or William H. Parshall, cashier, in the bank; that he said to whoever was present he had come to pay that note, the $200 note in question; that the person addressed said the books were locked up, but he would take the money and cancel the note in the morning; that the witness paid that person $200 in bills, and went away; that he made a memorandum of the payment, in his cash book, which he produced; that the last of August, or the first of September, he was informed by his assignee that the note was claimed by the plaintiff to be unpaid; that he went and saw the plaintiff, who showed him the note; that the witness told the plaintiff that the note had been paid; he said he thought not. That in July following, after the wit-

ness had made an assignment, he said to the plaintiff, you have two notes against me; that the plaintiff said he would look and see; and showed the witness the $175 note, and one of $150, which was not due, and said that was all; and that the plaintiff never mentioned the $200 note until the last of August, or the first of September, when his assignee spoke to him about it. The defendant testified in his own behalf, that he first heard of the note, after he guaranteed it, about the middle of September; that on one occasion he met the plantiff, and said to him, "you hold two notes with my name on," and as soon as things could be got around, the notes should be taken care of; and the plaintiff remarked, well, get around as soon as you can; that witness named the notes; and that he referred to the $175 and the $150 notes. The defendant then rested. James D. Westfall, a witness for the plaintiff, testified: That he was teller in the bank in April, 1861; that Owen K. Klinck never paid him any money on the $200 note, never left at the bank, when the witness was there, $200 to pay this note; that there is no entry on the bank books showing payment; and that he never received any money without entering it. William H. Parshall, a witness for the plaintiff, testified: That he was cashier of the bank in April, 1861; that Owen K. Klinck never paid the $200 to him; that the witness went to Buffalo about the first of April, returned the twenty-third, and went into the bank the morning of the twenty-fourth of that month. Robert B. Ennis, a witness for the plaintiff, testified: That he had charge of the books of the bank in April, 1861; that Owen K. Klinck never paid him any money to pay this note; and never, when he was there, left any money at the bank to pay this note; that William H. Parshall, the cashier, was absent when this note fell due. The plaintiff testified in his own behalf: That he did not tell Owen K. Klinck, at the time referred to in his testimony, that the plaintiff held but two notes against him; that the plaintiff then held three notes against him. That two or three weeks after the $200 note

became due, he met Owen K. Klinck on the sidewalk, when the latter dunned himself in reference to this note, and said he would take it up very soon; that the plaintiff first heard that it was claimed this note was paid, about four weeks after Owen K. Klinck's assignment, which was about the first of July; that the plaintiff had several conversations with Seth H. Klinck about the notes, and the first time nothing was said about the note having been paid. The plaintiff rested. The plaintiff requested the court to charge the jury, that leaving the money with a person in the bank, under the circumstances testified to by Owen K. Klinck, was not payment of the note, unless the money was shown to have come to the plaintiff's use. The court declined, and charged to the contrary, and the plaintiff excepted. The jury rendered a verdict for the plaintiff for the amount of the $175 note and interest, disallowing the claim on the $200 note. The plaintiff moved for a new trial at the special term, upon a case containing the evidence and exceptions above stated; and also upon affidavits. It was shown by the affidavits of the plaintiff, Westfall, the teller, and Ennis, the book keeper of the bank, that the trial was commenced in the evening, after a recess for tea; that the court directed that the proofs must be, and they were, closed that evening; that the plaintiff was hurried by the court in the trial; that the plaintiff and his witnesses, Westfall and Ennis, did not know, until it was disclosed on the trial, how, when, or where the $200 note was paid, as claimed by the defendant; that there was then no means or opportunity of examining the books and papers of the bank, and thereby refreshing their recollections as to the facts; and that the plaintiff was greatly surprised by the testimony given. That they have since examined said books and papers, and can now testify of their own knowledge, in addition to what they testified on the trial, that Owen K. Klinck was in the bank shortly before the close of business on the 19th of April, 1861, and attended to some business with the plaintiff; that at that time he requested the teller to

charge to his account the $200 note, which the teller said he would do, if the account was good for it; that Klinck said he thought his account was good for it—if not, he would make it good in a day or two; that at the close of business that day it was found that the amount to the credit of Klinck was $140.87, and the note was not charged because the account was not good for it. That Owen K. Klinck did business with the plaintiff's bank from September, 1860, to 1st July, 1861, and had a pass book, in which was entered the deposits. That on the 24th of June, 1861, the plaintiff called his attention to the $200 note lying over, and Klinck said he thought it was charged to his account; that if it was not, he would arrange it soon. That on the 29th of June, 1861, Owen K. Klinck had a balance of his account struck upon the bank books, and took up all his checks, notes and vouchers charged; and then promised to arrange the $200 note very soon. The balance to his credit then was $95.13. That his assignment contains a preference of guaranteed paper; and that the $200 note is the only paper of that description outstanding against him. The opposing affidavits of Owen K. Klinck and Seth H. Klinck show that they deny that the trial was hurried; the former states that in September, 1861, he told the plaintiff the $200 note was paid, and he could show it by his cash book; that the plaintiff refused to look at the cash book; and that the preference of the assignment for guaranteed paper was not intended to apply to this note. The attorney for the defendant swears the trial was not hurried, but states that the court announced the proofs must be closed that evening; and he says the clause in the assignment referring to guarantied paper was not inserted in reference to this note. The motion for a new trial was denied; and the plaintiff appealed to the general term.

T. R. Strong, for the appellant.

Wm. Clark, for the respondent.

By the Court, E. DARWIN SMITH, J. It seems to me that a new trial ought to be granted in this case, on the ground of surprise and newly discovered evidence. The action, so far as it relates to any matter in dispute, is upon a promissory note for $200. This note was dated Febuary 13, 1861, at sixty days, and fell due April 17. The defense to the note is that of payment. The answer sets up that said note was by the maker, before the commencement of the suit, duly paid off, satisfied and discharged. The pleadings are not verified, and it does not appear when the action was commenced; but from a statement in the defendant's answer that an offer was made on the 16th December, 1861, to allow judgment to be taken for the amount of another note mentioned in the plaintiff's complaint, I should presume this action could not have been commencced probably before the month of December, 1861, on these notes. It was therefore competent for the defendant to prove payment, under said answer, at any time after the maturity of the note and before the commencement of the suit.

Nothing in the answer fixed any definite or certain time of payment, or in any way apprised the plaintiff of the character of the evidence to prove said payment. And the plaintiff, in his affidavit on this motion, swears "that he was greatly surprised on said trial; that he did not know until he heard the testimony of O. K. Klinck and of his brother Seth C. Klinck *how*, *when* or *where* it was claimed this said $200 note mentioned in the complaint had been paid." In opposition to this statement, the said O. K. Klinck swears that he told Parshall, in September, 1861, that the note was paid on the 19th of April previous; but he does not say that he then stated *how* or *where* such payment was made; whether it was made to the plaintiff in person or at the bank; and if so made, whether to the cashier or a clerk, or to which of the clerks; nor that it was made out of the usual order or course of business and after the bank was closed for the day, as he testified on the trial. I do not think, therefore, as the note

was not paid at maturity, and was not taken up when paid, was not paid in the usual course of business nor after bank hours to save a protest at the bank, that the plaintiff was apprised of the fact of payment, either by the answer or by Klinck, as stated, in such a manner as to enable him properly to meet this testimony of O. K. Klinck when given on the trial, and which clearly contains the first statement ever made to the plaintiff of the *particular time*, manner and *place* of payment and of the person to whom made.

The cause, it appears, was tried in the evening, as the plaintiff says, in a hurried way; and the testimony was closed that evening. After the witness Klinck testified to the payment, assuming the fact as above stated that the plaintiff and his clerk were all ignorant of such payment as they testified, it is quite apparent that the plaintiff must have been surprised by such testimony, and it seems to me that it may well be that he was unable immediately to meet the same, further than by the denial of it then made by himself and the witnesses then in attendance. When the nature of the fact is considered—payment—and when it is considered that the particular time, place and manner of payment was concealed in the breast of said Klinck till he testified on the trial, that he was testifying to a fact which discharged his own debt and discharged his surety, and that he might, if capable of testifying untruly, locate the time and place when and where he pleased, and give such attending circumstances as would help corroborate the main fact as he thought proper, or such as could not be readily met and contradicted, I think the facts present a fair case of *surprise* within the case of *Sargent* v. *Dennison*, (5 *Cowen*, 122,) and all the cases upon that head where new trials have been granted upon that ground, with that of newly discovered evidence, and particularly the case of *Seely* v. *Chittenden*, (4 *How.* 265, *and S. C.* 10 *Barb.* 303.)

So far as Klinck was concerned it was a single transaction, and likely to be remembered if true, while in respect to Parshall it was one of numerous business transactions occuring

at his bank and not likely to be remembered by himself or his clerk, and in respect to which it seems to me it would ordinarly be quite impossible for any banker, having a large amount of similar business and transactions on hand, instantly to meet, with the proper refuting evidence, the defendant's proof of payment. It seems to me, upon the assumption that Klinck is mistaken in his testimony, or testified untruly, that it obviously required time, after the facts attending the payment as stated by him were known to the plaintiff, to find out and discover the countervailing facts to prove such error or mistakes. It required time to inspect entries and examine dates and consider and reflect upon events contemporaneous and concurring, and facts and transactions calculated to recall memory and enable witnesses to testify with distinctness and certainty. After the testimony of Klinck was given, there clearly was no time during the progress of the trial of the cause to make such examinations as were requisite to meet such testimony. I do not see, assuming that the plaintiff's affidavit is true, that he did not know until he heard such testimony of Klinck, how, when or where it was claimed that said $200 had been paid, what he could have done, during the haste and hurry of the trial, more than to deny such payment and call his clerk to testify on the point whether either of them received such money or knew of such payment. These all deny it, and the latter swears by reference to this book that there was an excess of cash on the 19th and 20th of April of only about fifteen cents. If there was surprise at the testimony of Klinck, in respect to such payment, it remains to be seen whether any evidence is newly discovered, bearing upon the issues, which will make it proper to submit the cause to another jury. The plaintiff, his teller Westfall, and his book-keeper Ennis, now severally state in the affidavits upon which the motion for a new trial is made, that they have examined the books and papers in the plaintiff's banking office in order to refresh their recollection thereby, and they can now testify of their own knowledge that each

of them was present during the whole time of the afternoon of the 19th of April, 1861. The plaintiff says he was the last one in the bank, and closed the vault himself that afternoon; and they all say that the said O. K. Klinck was in the bank a short time before the close of business on that day, and had a business transaction with the plaintiff, and that he at that time requested the teller Westfall to charge to his account the said $200 note, and that the teller replied that he would do so if the account was good for it, and that said Klinck replied that he thought his account was good for it, or nearly good for it, and that if it was not good for it he would make it good in a day or two; and that said Klinck was not in the office again that day or evening, after this interview, and that he left no money in the bank with any person that day, or at any time afterwards, with which to pay said note; and further, that after the bank closed that day the account of said Klinck was examined; that he had $140.87 to his credit in the bank, and that said note was not credited to his account for the reason that it was not good for it. Three witnesses state that they will swear positively, in substance, to these facts. They were not in the case before, and have been discovered since the trial, and it seems to me that they are such newly discovered facts as bear materially upon the merits of the issue made by the plea of payment in the defendant's answer. These are pertinent to the issue, and quite important. These witnesses did deny the payment to them respectively on the former trial, and so far their evidence would be a repetition of what they then swore; but they did not then state, or recollect, as they say, the other facts, that Klinck was in the bank on the 19th of April and then requested this note to be charged to his account, and his statement that his account was good or nearly good for it, and the promise of the teller to credit it to his account if it was good, and the other important fact that he had $140.87 in bank on that day, and that his account was examined, and the note not

credited, because the full amount of $200 did not stand to his credit.

If there had been affirmative facts, essential to make out plaintiff's case, he would doubtles have been guilty of laches in not discovering them before the trial. But they are not such facts. The plaintiff had his note, which he had always retained, and he knew, as he testified, of no payment, and was not apprised of any pretense of payment. He could scarcely be expected to do anything more than produce his note, at the trial; but when the maker of the note had testified as he did, the facts above stated were all pertinent and material as mere negative testimony to contradict such payment. And I do not see how the plaintiff could well have prepared to contradict such statement till he knew what it was. It seems to me, therefore, there was no laches on the part of the plaintiff in not procuring such proof before the former trial.

The evidence is material. It has been discovered since the former trial. There was no laches in not discovering it before. The evidence goes to the merits. It goes to repel payment. The other inquiry, according to the rule applicable to such motion, as stated by Chief Justice Savage in *The People* v. *The Superior Court of New York*, (10 *Wend.* 292,) is, is the evidence cumulative?

It is not cumulative in the proper sense of that word. Cumulative evidence means additional evidence of the same kind or degree as that previously given. Chief Justice Savage says, in the case above cited: "Cumulative evidence means additional evidence to support the same point, and which is of the same character with the evidence already given."

All evidence material to the issue, after any such evidence has been given, is in a certain sense cumulative; that is, is added to what has been given before. It tends to sustain the issue. But cumulative evidence, in legal phrase, means evidence from the same or a new witness—simply repeating, in substance and effect, or adding to, what has been before

testified to. In this case, for instance, the plaintiff and Westfall and Ennis respectively will testify to the same facts above stated, that Klinck was in the bank on the afternoon of the 19th of April, and requested the teller to charge the note to his account; said his account was good, and had in fact $140.87 to his credit at the time, and the teller promised to do so if the account was good. If either of these witnesses had testified to these facts on the former trial, it would be cumulative evidence to call either of the other witnesses to prove the same facts, and a new trial could not be granted, upon well settled principles, to receive such testimony. But the evidence proposed to be given is to prove *new facts* not proved on the former trial, and is not therefore subject to the objection that it is cumulative.

The plaintiff also states that he can prove that on the 29th of June, 1861, said Klinck called at his bank, and had a balance struck upon the books and took up his checks and vouchers, and at that time promised to arrange this note soon; and also, that on the 24th of June previous, the plaintiff spoke to him about this note in the bank, as then lying over, and he then said he thought it had been charged to his account, and he said he would arrange it soon.

Both of these transactions occurred within the knowledge of the cashier of the plaintiff's bank, and his book-keeper Ennis. The facts are entirely inconsistent with the testimony of Klinck that the note had previously been paid, and I think they confirm the testimony of the plaintiff, that he did not know at the trial, of the time, manner and mode of payment, alleged, so far at least as to show that no payment was pretended to have been made before the 29th day of June; and in this view they relieve the plaintiff from the duty to prepare to meet evidence of payment at any previous time.

But this evidence the plaintiff, I think, should have given on the former trial, and it is not such evidence as he could be allowed to forget and claim to be excused from the conse-

quences of such neglect; for as Chief Justice Parsons said in *Bond* v. *Cutler*, (7 *Mass.* 207,) "a want of recollection of a fact, which by due attention might have been remembered, can not be a reasonable ground for granting a new trial; for want of recollection may always be pretended, and may be hard to disprove." I think, therefore, there should be a new trial granted, and the case should be submitted to another jury. These motions are granted in the discretion of the court, and usually upon the payment of costs. In the case of *Seely* v. *Chittenden*, (4 *How.* 265,) the motion was granted with costs to abide the event, because the defendant was surprised by the evidence in question, given out of the usual order.

I think that in this case the plaintiff should pay the costs of the former trial, and the subsequent costs, including the costs of the appeal which should abide the event.

New trial granted.

[Monroe General Term, December 5, 1864. *J. C. Smith, Johnson* and *E. Darwin Smith*, Justices.]

Power *vs.* Hathaway.

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7h 219
7h 330
68a 87
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65h 20

It is a settled principle of international law, that all suits must be brought within the period prescribed by the local laws of the country where they are commenced.

The *lex fori* governs all questions arising under the statutes of limitations of the various states of this country.

A defendant in a personal action who is resident abroad can not avail himself of the statute of limitations of this state until he has returned to, and actually been a resident of, this state, and subject to process of its courts, for the period of six years.

Under our statute of limitations, the only question, upon its being set up as a defense, is whether the defendant has been within the state of New York, and amenable to process of its courts, for six years before the commencement of the suit. If so, the statute is a complete defense, except in case of the special disabilities specified in the 101st section of the code, in favor of plaintiffs.

Power v. Hathaway.

Where the plaintiff and defendant, at the time of contracting the debt, were, and had ever since been, residents of the state of Michigan; *Held*, that the courts of this state could not give effect to the statute of limitations of the state of Michigan; and that the defendant, being a non-resident of this state, could not set up our statute as a bar.

Where several legatees, entitled to a sum of money bequeathed to them in equal shares, join in a power of attorney to another, authorizing him to collect for them their respective legacies, each legatee may maintain an action in severalty, against the attorney, to recover the amount of his legacy.

Such an action is maintainable without any previous demand.

GIDEON PAYNE, late of Farmington, Ontario county, New York, died on or about the 23d of November, 1848, leaving a last will and testament, duly admitted to probate by the surrogate of Ontario county, by which he gave to his three grandsons, the plaintiff being one, the sum of $600, to be paid to them by his executors equally, as they should respectively arrive at the age of twenty-one years. He directed that his real and personal estate should be sold and converted into money after the decease of his wife Phebe Payne, and that these legacies should be paid out of the proceeds of such sale. Phebe Payne died the 3d day of April, 1854, and on the 22d of June, 1855, the real estate of said Gideon Payne was sold. The three grandchildren were then, and still are living, and then were and continued to be residents of the state of Michigan when the above action was commenced. The defendants, on the 1st day of June, 1855, procured from these three legatees a power of attorney to collect for them their legacies, and at that time, and ever since, he had been a resident of the state of Michigan. On the 28th day of June, 1855, he collected of the executors the legacies bequeathed to said three legatees, and gave his receipt therefor, in pursuance of said power of attorney. These legacies he had failed to pay over to said legatees. The defendant was the owner of a farm in Ontario county, and each of said legatees, of which the plaintiff is one, commenced an action against the defendant for his legacy thus collected by the defendant. The actions were commenced by pub-

lication of the summons against the defendant as a non-resident, and a warrant of attachment was issued and said farm attached. The action was commenced on the 16th day of May, 1862, and on the 16th day of November, 1863, the defendant set up as a defense the statutes of limitations of this state and of Michigan. The action was tried by Hon. Henry Welles, without a jury. At the close of the testimony the defendant moved for a nonsuit on the following grounds: 1st. The evidence shows that more than six years have elapsed since the cause of action arose, and the demand is barred by the law of Michigan and of New York. 2d. The plaintiff and defendant being residents of Michigan, and the contract which is the foundation of the action having been made there, the action by attachment can not be maintained in this court. 3d. There is no proof, and no averment in the complaint, that the plaintiff demanded of the defendant the payment of the money before the action was commenced. 4th. The action is based upon the right created by the power of attorney, which is a joint power by the three legatees named, and the legacy is to the three or the survivors of them; that therefore the action can not be maintained by the plaintiff. The three can not sever and bring separate actions, and the defenses in that respect in the answer should be sustained. The court denied the motion on each ground, and the defendant excepted. The said justice thereupon made a report adjudging the plaintiff entitled to recover of the defendant his legacy, with the interest thereon from the 28th day of June, 1855, amounting to the sum of $316; upon which report judgment was duly entered, and the defendant appealed therefrom to the general term.

E. G. Lapham, for the appellant.

Wm. H. Smith, for the respondent.

By the Court, E. Darwin Smith, J. In the findings of the learned judge who tried this cause at the circuit

without a jury, it is stated that the defendant received the money for which the action is brought on the 28th day of June, 1855, and this action was commenced on the 16th day of May, 1862; also that the plaintiff and defendant then were, and have ever since been, residents of the state of Michigan. The single question presented for our decision is, whether the debt is barred by the statute of limitations. The defendant has pleaded the statute of limitations of this state, and also that of the state of Michigan, which is the same as ours, in substance and effect.

It is a settled principle of international law, that all suits must be brought within the period prescribed by the local laws of the country where they are brought. The *lex fori* governs all questions arising under the statutes of limitations of the various states of this country. (*Story's Conflict of Laws*, § 577.) It follows that we can not give effect to the statute of limitations of the state of Michigan, though it is clear, as it is in this case, that the plaintiff's claim is utterly barred by that statute, and that such must have been the decision of the courts in that state. The case of *Olcott* v. *The Tioga R. R. Co.* (20 *N. Y. Rep.* 224,) settles the law in this state, that a defendant in a personal action, resident abroad, can not avail himself of the statute of limitations of this state till he has returned to and actually been a resident of the state and subject to process of our state courts for the period of six years. In the opinion of Judge Denio in that case, he says: "If the debtor, being an individual, resided out of this state when it [the cause of action] accrued, no period, however great, will bar the claim while he continues so to reside." But, in that case, as the plaintiff was a citizen of this state, and it was said to be the policy of the statute of limitations not to compel a creditor to pursue his debtor in a foreign jurisdiction, but to give him the period fixed by the statute for the prosecution of his debt in the state of his own residence, it is urged that a distinction is to be made between that case and the present, inasmuch as in this

case both the plaintiff and defendant, at the time when the right of action accrued, were, and ever since have been, residents of the state of Michigan. But this distinction can not be maintained. It is repudiated, in effect, in the case of *Olcott* v. *The Tioga R. R. Co.* In that case Judge Denio refers to and sanctions those cases where the plaintiffs as well as the defendants were non-residents of the state when the cause of action accrued and where the debt was barred by the law of the place where the parties at such time resided. The cases are those of *Ruggles* v. *Keeler*, (3 *John.* 262,) where the debt was barred by the statute of limitations of Connecticut; *Dwight* v. *Clark*, (7 *Mass. Rep.* 516,) where likewise the debt was barred by the statute of the same state; and *Bulger* v. *Roche*, (11 *Pick.* 36.) In this last cited case the debt was contracted in Nova Scotia, both the plaintiff and defendant were residents of Nova Scotia, and the debt was confessedly barred by the law of that province. Chief Justice Shaw said the question was "whether a plaintiff, a subject of a foreign state, can maintain an action against a defendant who is a subject of the same foreign state, upon a cause of action barred by the statute of limitations of the state of which they were respectively subjects, and where the cause of action accrued." It appears in the case that the parties both remained in Nova Scotia till the time of the limitation of the statute applied. The statute of Massachusetts contained the exception in favor of the plaintiff, "*beyond the sea*," contained in the 7th section of the statute of James. The court held that "*beyond the sea*" should be understood to be *without* any of the United States; and that the plaintiff being out of the state was within the exception, and that the proviso relating to the defendant also excluded the operation of the statute, he being also out of the state. This case, in its facts and principles, is like th present one, entirely, in the most favorable view of the case, for the defendant. And the case of *Olcott* v. *The Tioga Rail Road Co.*, (*supra*,) affirms it to be good law, and virtually

decides that the statute of limitations is in no shape available as a defense to the defendant in this action. Our statute, it is true, contains no such exceptions in favor of the plaintiff's residence as that contained in the Massachusetts statutes, but the exception in relation to defendants is the same. Under our statute, the only question is whether the defendant has been within the state and amenable to process of its courts for six years before the commencement of the suit. If so, the statute is a complete defense, except in cases of special disabilities specified in the 101st section of the code in favor of the plaintiffs. Unless the plaintiff labors under some one of the disabilities specified in that section he must commence his suit within the time limited in the statute for the several causes of action therein mentioned, where he may chance to reside, whether a citizen of the United States or an alien. The defendant therefore is clearly not entitled to the benefit of the statute of limitations of this state.

The action, I think, could be brought in severalty by either of the legatees joining in the power of attorney to the defendant. Their claims were several and not joint, and each was entitled to payment from the defendant, when the latter received the money. The suit was maintainable, too, without any demand before suit brought. The money for which the action was brought was received by the defendant to the plaintiff's use, and it was his duty to have paid it to the plaintiff and remitted it to him. In such case, no demand is necessary, in order to maintain the action. (*Stacy* v. *Graham*, 4 *Kern.* 496.) I think the judgment below should be affirmed.

Judgment affirmed.

[Monroe General Term, December 5, 1864. *Welles, E. D. Smith* and *Johnson*, Justices.]

The Wayne and Ontario Collegiate Institute *vs.* Devinney.

In an action upon a subscription paper for the erection of an institution of learning, the question arose upon the evidence, as one of fact, whether the defendants had recognized the plaintiffs as the legal body authorized to proceed to erect the said institution, and to enforce his subscription, and entitled to regard him as requesting them to proceed with the work, upon the basis of the subscriptions, and had not waived all objection, if any existed, to the appointment of trustees. *Held*, that upon the assumption that there was evidence, upon that issue, sufficient to warrant the jury in finding against the defendant, the liability of the defendant was properly presented and submitted to the jury upon the question whether he had recognized the plaintiffs as duly organized and the proper authorities to collect and enforce his subscription, and had requested them to proceed in the construction of the edifice.

And that in this view, evidence showing that the trustees, upon whose action the plaintiffs claimed to recover, were not elected at M. the place designated in the subscription, or at any other place, by the association in whom the power of election was vested, but that another board of trustees was elected at M., and that the plaintiff had not derived title to the subscription from or through the last mentioned trustees, or the association, was immaterial, and was properly excluded.

MOTION for a new trial, upon a case and exceptions ordered to be heard in the first instance at a general term. The action was brought to recover the amount of several calls upon a subscription for the erection of an "institution of learning," to which it was alleged the defendant had subscribed $100. The subscription paper is set forth at length in *The Wayne and Ontario Collegiate Institute* v. *Smith*, (36 *Barb.* 576;) to which case, and to that of *The same plaintiffs* v. *Greenwood*, (40 *Barb.* 72,) reference is made, for a fuller statement of the facts.

At the close of the plaintiffs' proofs, the counsel for the defendant moved for a nonsuit, on the following grounds: "1st. It is not proven, on the part of the plaintiffs, that any application has been made to the defendant, by any one of a board of trustees elected at Marion, agreeably to the terms of the subscription signed by the defendant. 2d. The sub-

scription was made upon the faith of the Wayne County Baptist Association giving their patronage and support to the enterprise of erecting a building for and organizing an institution of learning and carrying the same forward; and as that association did not give their patronage and support to the enterprise, the plaintiffs can not recover. 3d. The subscription was conditional upon the baptist association keeping the institution in operation, and as the condition has not been performed, the plaintiffs can not recover. 4th. The appointment, by the trustees of the plaintiffs, of trustees in the place of trustees who had removed from the county, and the removal of others for adverse action to the majority, as shown by the records of the proceedings of the trustees in evidence, were unauthorized and irregular; and that the action of the pretended trustees in making calls upon the subscriptions thereafter, was inoperative and void. 5th. The abandonment of the work of erecting the building from the fall of 1855 to the fall of 1860 relieved the defendant from all obligation on his subscription in respect to further proceedings for erecting the building. 6th. The payment by the defendant of one call upon his subscription, as proved, can not affect his liability in regard to the balance of the subscription; certainly not, as it was not with a full knowledge of the facts that the trustees of the plaintiffs were not elected at the time, and place, by the meeting referred to in the subscription. 7th. The subscription was without consideration and void. 8th. If after the suspension of the work on the building, the expenses then incurred were paid, and the defendant declined to pay further on his subscription, he is not liable thereon in further expenditures or liabilities thereafter."

The court denied the motion upon each and every of the grounds above stated, to which ruling and decision the defendant's counsel excepted. The defendant's counsel then offered to prove that a board of trustees was elected at Marion by the Wayne County Baptist Association; that there was

no adjournment of this board to Palmyra; and that no trustees were elected at Macedon or Palmyra by this association, and that the plaintiffs had not derived title to the subscription from or through the Marion trustees or said association. To this offer the plaintiffs' counsel objected; the objection was sustained by the court and the evidence excluded, to which ruling and decision the defendant's counsel excepted.

The jury found a verdict for the plaintiffs, for $108.15.

S. K. Williams, for the plaintiffs.

Strong & Mumford, for the defendant.

By the Court, E. DARWIN SMITH, J. The questions raised upon the motion for a nonsuit, on the trial of this action, have all, in substance, been previously disposed of in the case of *The same plaintiffs* v. *Smith,* (36 *Barb.* 576,) and *The Same* v. *Greenwood,* (40 *id.* 72.)

The chief question not thus previously passed upon, now arises upon offers of the defendant to give certain proof, which was excluded. The defendant offered to show that a board of trustees was elected at Marion by the Wayne County Baptist Association; that there was no adjournment of the board to Palmyra; that no trustees were elected at Macedon or Palmyra by this association; and that the plaintiffs had not derived title to the subscription from or through the Marion trustees or said association. At another stage in the cause, the defendant's counsel further offered to prove, that "the trustees upon whose action the plaintiffs claim to recover in this case were not elected at Marion, or any other place, by the Wayne County Baptist Association; and that another board of trustees was elected at Marion." These propositions are substantially the same, and tend to the same end. They were directed to disprove allegations of the plaintiffs' complaint, and were obviously, for that reason, admissible, if the allegations which they sought to disprove were

essential to the plaintiffs' right of recovery. It was error to exclude evidence tending either to prove or disprove a material issue in the cause. The evidence offered must have been excluded, by the circuit judge, upon the ground that it did not tend to establish or disprove a material issue. When this evidence was offered, the plaintiffs had proved their incorporation, by a charter from the regents of the university duly granted; and that the trustees named in such charter met in July, 1855, and duly organized as a board of trustees; that they proceeded to purchase a lot for their proposed college building, and to make contracts for the construction of such building, and to incur other expenses. That in the fall of that year they made calls upon the subscribers upon their subscriptions, and that the defendant paid one of such calls; that they made subsequent calls; and that the defendant on repeated occasions recognized his subscription as binding, and, on some, promised payment; that the work had progressed by degrees, and had been suspended from time to time for want of funds, till they had constructed the building two stories high. Upon this and other evidence upon the same points the question arose, as one of fact, whether the defendant had recognized the plaintiffs as the legal body authorized to proceed to erect said collegiate institute, and to enforce his subscription, and entitled to regard him as requesting them to proceed with said work upon the basis of his subscription, with others, and had not waived all objection, if any existed, to the appointment of trustees, &c. (17 *How.* 287.) It was upon the assumption that there was evidence upon this issue sufficient to warrant the jury in finding against the defendant that the circuit judge doubtless overruled the defendant's offers, as they did not bear upon this issue. The case was submitted to the jury, and it seems no objection or exception was taken to the charge. We must presume, therefore, I think, that the question of the defendant's liability was properly presented and submitted to the jury upon this distinct question, whether he had recognized the plaintiffs as duly

organized, and the proper authorities to collect and enforce his subscription, and had, after the incorporation of the plaintiffs, requested them to proceed with the work of constructing said institution. The jury must be deemed to have found this issue, upon a proper submission to them, against the defendant. Upon this assumption, the evidence offered by the defendant, and excluded as aforesaid, was entirely immaterial. If the plaintiffs' action had been based entirely upon subscription papers, independently of the payment and admissions of the plaintiffs after the charter had been obtained, it would then undoubtedly have been necessary for the plaintiffs to show that the trustees named in the charter had been duly appointed at the meeting at Macedon on the 30th of May, 1855, or, as we held in the case of *Greenwood*, (*supra*,) at some meeting of the Wayne County Baptist Association duly continued by adjournment from such meeting at Marion.

But as this case appeared at the circuit, where these offers were made, I think the evidence was immaterial, and that the exception taken to its exclusion was not well taken. If given, it would not have precluded the plaintiffs from a recovery upon the grounds above stated, which the defendant was at perfect liberty to controvert. The offer to show that some disagreement afterwards existed among the baptist denomination, and that resolutions were passed at some meetings of the Wayne County Baptist Association in 1861, cautioning the public against subscriptions to or aiding the plaintiffs in the said enterprise, were properly excluded. They could not discharge or affect the defendant's liability. The request to the judge to submit to the jury the question whether the work upon the building referred to had been abandoned, was properly denied. There was no evidence to warrant such a finding; and if there had been, the defendant would be responsible, in proportion to the other subscribers, for the debts and expenses incurred by the plaintiffs.

Upon the whole case, I think the motion for a new trial should be denied.

New trial denied.

[Monroe General Term, December 5, 1864. *J. C. Smith*, *Welles* and *E Darwin Smith*, Justices.]

Smith and others *vs.* The New York Central Rail Road Company.

43 225
21 201
36 169
32n 181
41a 398
41a 699
75a 148

The owner of goods suing a common carrier to recover damages for an injury happening to the goods through negligence, must give evidence sufficient to show that the goods were in a good condition when they came to the possession of the defendant, as a part of the evidence that they have been injured while in his custody.

Merely showing a delivery of the goods by the carrier, in an injured condition, is not enough. It must be shown in what condition the carrier received them, in order to prove an injury in his hands.

This may be shown by direct affirmative evidence, or by proof of facts and circumstances from which the presumption of fact arises that the goods were in a proper condition when the carrier received them.

Where property is delivered to a rail road company, to be transported by that and another company, over their respective roads, to its place of destination, it is enough for the owner, in an action against the company delivering the property, to recover damages for negligence, to show that he delivered the property to the first company in good order, and the burthen is then cast upon the company delivering the goods thus injured, of proving that they were not injured while in its possession, or that they came to its possession thus injured.

The liability of a rail road company as a carrier of freight is for its own acts, or for injuries which such freight receives while it is in its custody for the purpose of transportation; and not for the acts of other companies which may have previously injured such freight.

The provision of the statute, that "whenever two or more rail roads are connected together, any company owning either of said roads receiving freight to be transported to any place on the line of either of said roads shall be liable as common carriers, for the safe delivery of such freight at such place," was intended to apply only to the company originally receiving and undertaking to convey and deliver the freight, and not to create any lia-

bility against any other company for an injury sustained by goods while in the possession of the company originally receiving them.

An intermediate carrier, who was not a party to the original undertaking is liable, *it seems*, only as an ordinary carrier, for loss or damage arising while the goods are in his possession as such carrier. *Per* JOHNSON, J.

This gives the owner his election, in case of loss or damage, to bring his action either against the carrier with whom the original undertaking was entered into, or against the particular carrier in whose hands the loss or injury has occurred. *Per* JOHNSON, J.

The latter is clearly liable for his own default, without any aid from the statute.

Where the plaintiff delivered to the Western Rail Road Company, in Massachusetts, whose road connected with that of the New York Central Rail Road Company, at Albany, goods to be transported to M. at Rochester, which goods were received by M., from the latter company, in a damaged condition; *Held*, that without further proof than that of the delivery of the goods in good condition, to the Western Rail Road Company, the court would infer a delivery of the property, in the same condition, by that company, to the New York Central Rail Road Company to be transported by the latter company, as carrier, to Rochester; and that enough was proved to put that company upon its defense, and to authorize a recovery, in the absence of any counter evidence.

THIS is an action brought for the recovery of damages alleged to have occurred to certain merchandise, through the negligence of the defendant as a common carrier, on or about the first day of February, 1857. The property in question, and the claim for damage thereto, was assigned by the vendee, Milliman, to these plaintiffs, before the commencement of this action. The action came on to be tried at the Monroe circuit, in April, 1864, before his honor JAMES C. SMITH, justice, and a jury. The plaintiffs proved that January 29, 1857, Smith, Palmer & Co. delivered to the Western Rail Road Company a case of cigars, directed in substance to R. Milliman, Rochester, New York, to be duly forwarded to him; that in February of that year the defendant delivered the cigars, in bad order, to the vendee, Milliman; that "the Western R. R. and the N. Y. C. R. R. connect together at Albany;" also entries in the defendant's books at Albany, showing, in abreviations, the receipt

of the cigars from the western rail road by the defendant. The plaintiffs offered in evidence the affidavit of A. A. Wemple, general freight agent of the defendants at Albany, explaining said entries, and admitting that there were no entries in the defendant's books at that place, for 1857, showing any damage to said cigars, which was excluded by the court. The plaintiff further proved the measure of damages, viz. $309, at that time, their value in the condition in which they were delivered to the vendee being nothing whatever; the assignment of the bill of said cigars, and the claim for damage thereto, to the plaintiffs. The plaintiffs having rested, the defendant moved for a nonsuit; which motion was granted. A stay of proceedings for sixty days was ordered, to enable the plaintiffs to make a case and exceptions, to be heard at the general term in the first instance.

F. J. Mather, for the plaintiffs.

T. R. Strong, for the defendant.

By the Court, JOHNSON, J. The action was brought against the defendant as a common carrier, to recover damages alleged to have been done to the goods of the plaintiffs' assignee, while in the defendant's possession as such carrier, by carelessness and negligence. The plaintiffs, to maintain the action, proved the delivery of the property in good order to the Western Rail Road Company, in Massachusetts, to be transported to R. Milliman in Rochester, New York; that the rail road of that company connected with the defendant's rail road at Albany; that the goods were delivered to Milliman at Rochester by the defendant's freight agent in a condition so damaged as to be entirely worthless. He also gave in evidence copies of entries in the defendant's books tending, in some degree, to show that the goods were received by the defendant at Albany from the Western Rail Road Company. This evidence was uncontradicted. The plaintiffs

were nonsuited. I am of the opinion that the nonsuit was wrong, and should be set aside. The defendant's counsel insists that there was no evidence to show that the property was in a sound condition when it was received by the defendant. If this is so, the nonsuit was proper. The plaintiffs must of course give evidence sufficient to show that the goods were in good condition when they came to the possession of the carrier, as part of the evidence that they have been injured while in the carrier's custody. Merely showing a delivery by the carrier in an injured condition is not enough. It must be shown in what condition the carrier received them, in order to prove an injury in his hands. This may be shown by direct affirmative evidence, or by proof of facts and circumstances from which the presumption of fact arises, that the goods were in proper condition when the carrier received them. Enough was, I think, proved in this case to raise such presumption. The property was placed in the possession of the Western Rail Road Company in good order and condition, and until the contrary is shown, must be presumed to have continued in that condition while in the possession of that company. It was delivered by the defendant, after being transported over its road from Albany to Rochester, in a damaged condition; and the further presumption necessarily follows, that it received the injury while in the possession of the defendant. The general rule is, that things once proved to have existed in a particular state, are to be presumed to have continued in that state until the contrary is established by evidence, either direct or presumptive. (*Best on Presumptions*, § 136. *Sleeper* v. *Van Middlesworth*, 4 *Denio*, 431. *Walrod* v. *Ball*, 9 *Barb.* 271. *Cooper* v. *Dederick*, 22 *id.* 516.) Unless this rule is to be applied to goods delivered, to be transported over several connecting rail roads, there would be no safety to the owner. It would often be impossible for him to prove at what point or in the hands of which company, the injury happened. But give to such party the benefit of the presumption that the goods he has delivered in good

order in such case, continued so until they came to the possession of the company which delivers them at the place of destination in a damaged condition, and his rights will be completely protected. The burthen is then shifted upon the latter company of proving that such goods came to its possession in a damaged condition, by way of defense. This proof the latter company can always make, much more easily and readily than the converse can be proved by the owner. This is in perfect harmony with a well settled rule of law, as an exception to the general rule. The general rule undoubtedly is, that the burthen of proof is always upon the party who asserts the existence of any fact which infers legal responsibilty. But the exception is equally well established, that in every case the *onus probandi* lies on the party who is interested to support his case by a particular fact which lies more particularly within his knowledge, or of which he must be supposed to be cognizant. If the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party. (1 *Greenl. Ev.* § 79. 1 *Stark. Ev.* 362–365. *Wills on Circumstantial Ev.* 183, 184.) This applies in all civil cases. A familiar instance is, the action to recover the penalty for the violation of the exercise law. And it applies also in criminal cases in weighing the evidence, after slight evidence has been given, sufficient to raise the presumption that the allegation is true, in the absence of any evidence to the contrary. In this case, and all cases of like nature, I think it is enough for the owner to show that he delivered the property to the connecting road in good condition, and that the burthen is then cast upon the company delivering the goods injured of proving that they were not injured in their possession, or that they came to their possession thus injured. This evidence in almost every case is all that the owner can possibly give, inasmuch as he is not supposed to accompany his property in the transit. The defendant was unquestionably a common carrier in reference to this

property, and subject to all the liabilities of such carrier to the plaintiffs, though it may have received it from the Western Rail Road Company alone, and upon its undertaking to transport the property to Rochester. The statute (2 *R. S.* 693, § 67, *5th ed.*) expressly makes any rail road company receiving freight for transportation, subject to the same liabilities as common carriers. The liability attaches upon the receipt of the property for the purpose of being transported, and is to the owner of the freight. But this liability is for its own acts, or for injuries which such freight receives while it is in its custody for such purpose, and not for the acts of other companies which may have previously injured such freight. The plaintiffs' counsel seems to insist that, under § 67 of the statute above referred to, the defendant would be liable to the plaintiffs, even though the goods were injured while in the possession of the Western Rail Road Company, and came to the possession of the defendant in the same injured condition in which it was delivered by the defendant at Rochester. But I do not think the statute was intended to create any such liability against any company except the one which first received and undertook to transport the freight. The language is, "whenever two or more rail roads are connected together, any company owning either of said roads receiving freight to be transported to any place on the line of either of said roads so connected, shall be liable as common carriers for the delivery of such freight at such place." It is obvious, I think, that this was intended to apply only to the company originally receiving and undertaking to convey and deliver the freight. In this respect the statute is only declaratory of the common law obligation of the carrier making the contract. He undertakes for all the carriers intermediate the points of shipment and delivery. (*Burtis v. The Buffalo and State Line R. R. Co.* 24 *N. Y. Rep.* 269.) But an intermediate carrier, who was not a party to the original undertaking, would, I apprehend, be liable only as an ordinary carrier, for loss or damage arising

while the goods were in his possession as such carrier. This gives the owner his election, in case of loss or damage, to bring his action either against the carrier with whom the original undertaking was entered into, or against the particular carrier in whose hands the loss or injury has occurred. There can be no doubt, I suppose, that the latter is clearly liable for his own default, without any aid from the statute.

Courts may take judicial notice of whatever ought to be generally known, within the limits of their jurisdiction. (1 *Greenl. Ev.* § 6.) This would, I think, include notice of the great lines of public travel and transportation of property, and their connection with each other, and the general course of trade and transportation through the country. In a case like this the court would infer, without further proof than was given, a delivery of the property by the Western Rail Road Company to the defendant to be transported by the latter, as carrier, to Rochester. I am clearly of the opinion, therefore, that enough was proved by the plaintiff to put the defendant upon its defense, and to authorize a recovery by the plaintiffs, as no counter evidence was given. If these views are correct, it follows that the nonsuit should be set aside and a new trial granted, with costs to abide the event.

[Monroe General Term, December 5, 1864. *E. Darwin Smith, J. C. Smith* and *Johnson*, Justices.]

43 232
31a 471
43 232
49 507
5L 145
3h 549
20h 461
25h 135
34a 516
39a 88

The People, *ex rel.* Dickinson, *vs.* The Board of Supervisors of Livingston County and others.

The office of a writ of certiorari is to bring up, for review in the superior court, the record of an inferior court, or of a tribunal exercising judicial functions. It is not the office of the writ to bring up the proceedings of any other bodies or classes of public officers.

A board of supervisors, in passing resolutions to provide for raising money upon the credit of their county, for the use of said county, or upon the credit of any town thereof, for the use of such town, for the purpose of paying bounties to volunteers into the military or naval service of the United States, under the authority given by the act of February 8, 1864, (*Laws, ch.* 8,) are not acting in a judicial, but in a purely legislative capacity.

The supreme court can neither affirm nor reverse, or set aside, mere initiatory resolutions, of that character, or make any order in respect to them, upon certiorari.

A resolution passed at a town meeting, providing for the raising of money on the credit of the town, to pay bounties to volunteers, is not a judicial act, and can not be affirmed, or reversed or set aside, on certiorari.

A certiorari will not lie to bring up the incipient resolutions or proceedings upon which a tax may ultimately be based, before any tax is laid, or any final adjudication or determination is had upon the matter.

A RETURN being made to the writ of certiorari issued in this action, and a motion being made by the respondent to quash such writ, the argument upon the return and the motion to quash were brought and heard together. The facts of the case sufficiently appear in the opinion of the court.

H. Chalker and *Geo. F. Danforth*, for the relator.

A. J. Abbott and *T. R. Strong*, for the respondents.

By the Court, E. Darwin Smith, J. The writ of certiorari in this case is directed to the board of supervisors of Livingston county, to Alfred Bell, supervisor of the town of Nunda, and to Whitman Metcalf, town clerk of said town. It recites that the said board of supervisors, on the 3d day of August, 1864, passed a certain resolution providing among

other things that the treasurer of said county issue the bonds of said county to each supervisor of the county, or borrow money on said bonds for such supervisor, to pay a bounty not exceeding $300 to each recruit that shall be mustered into the service of the United States, to the credit of their respective towns, for three years, and not exceeding $200 to each recruit mustered for one year. That the board of supervisors assess the bonds or money so furnished to the towns respectively; that each person furnishing a substitute shall be entitled to said bounty, and each national guard or militiaman shall be entitled to such fractional part of any town bounty corresponding to the fractional part of any credit that may accrue to such town in consequence of actual services of such guard or militiaman; and also reciting that on the 2d day of September, 1864, the said board, at a meeting duly convened, passed another resolution authorizing each town in said county to increase its bounty to a sum not exceeding $1000, and the treasurer of the county to issue the bonds of the said county to each supervisor, subject to the regulations contained in the aforesaid resolution passed August 3, 1864; and also reciting certain proceedings for the calling and holding of two special town meetings in the said town of Nunda, called for the purpose of passing resolutions in conformity with the foregoing resolution to raise money on the credit of such towns to pay bounties to volunteers, at one of which meetings the voters refused to authorize the payment of $1000 to volunteers, and at the second meeting the voters voted to authorize the supervisor to receive bonds from the county treasurer to pay a bounty of $900 to each volunteer on the credit of said town, and referring to the said resolutions. Said writ required the board of supervisors and the supervisor and town clerk of the said town of Nunda to make return of said resolutions, and their proceedings thereupon. The return to the writ accordingly sets forth a copy of the resolutions passed by the board of supervisors and by the town meeting in Nunda last held, and the proceedings con-

nected therewith, corresponding in terms with the resolutions recited and referred to in the writ.

A common law certiorari is a judicial process directed to an inferior court or tribunal, and brings up simply the record of the proceedings of such inferior tribunal. Nothing is before us, therefore, upon this writ, except simply the resolutions of the board of supervisors, and the resolution passed at the special town meeting in Nunda, and the calls or notices and requests to call such town meeting.

The office of the writ of certiorari is to bring up for review in the superior court the record of an inferior court or of a tribunal exercising judicial functions. It is not the office of the writ to bring up the proceedings of any other bodies or classes of public officers. Courts are instituted to decide judicial questions, and superior courts review the record and proceedings of inferior courts, or of officers or tribunals acting in a judicial capacity, and in no other.

In passing the resolution brought before us on this writ, the board of supervisors were not acting in any judicial capacity. They were acting purely in a legislative capacity. They were given by section 22 of the act of February 8, 1864, chapter 8, a large legislative authority and discretion.

They are expressly authorized and empowered, at any meeting of said board duly called and convened, to adopt resolutions to provide for raising money upon the credit of their county for the use of said county, or upon the credit of any town thereof, for the use of such town, for the purpose of paying bounties to volunteers into the military or naval service of the United States. It was, within this grant of power, a question addressed to the discretion of the board of supervisors and confided to their judgment by the legislature, to determine whether they would raise any money, and if so how much, and in what manner they would raise such money, for the purpose specified in such act. It was not a question of a judicial nature, but one of a clear legislative character.

The resolutions passed by the board were acts or measures

in the execution of their legislative power over the subject. They had nothing of the character of a judicial record or of judicial proceedings. If the board exceeded the power conferred upon it, the resolutions were simply invalid; but it seems to me that it would be quite extraordinary for this court to attempt to review them, or to render any judgment to affirm, or reverse or set them aside, and this would be the only judgment we could render upon the proceedings before us. If there be any defect or excess of power in passing the resolutions, no one as yet is injured by them; and the board may not proceed to carry them into effect. They may at a subsequent meeting rescind or modify them. But if they should not do so, assuming that then the resolutions were unauthorized and void, when they proceed to carry them into effect it will be time enough for the relator to apply for appropriate relief or redress; but I do not think we can either affirm or reverse or set aside mere initiatory resolutions like these, or make any order in respect to them, upon certiorari. It is undoubtedly true that the writ has been allowed and retained in cases not strictly judicial. In some cases the power of the court to award the writ, and to review the proceedings of courts and officers clothed with power to affect the rights and property of the citizen, has been asserted in terms quite sweeping and extensive. Such are the cases of *Lawton* v. *Com'rs of Highways*, (2 *Caines*, 182,) and *LeRoy* v. *The Mayor of New York*, (20 *John.* 436, *and* 16 *id.* 49, 50.) Following these cases, this court, as organized under the former constitution, for many years seemed inclined to grant the writ with great looseness, and for the review of most kinds of official, ministerial, executive and administrative acts, and the proceedings of municipal corporations. But this course of decisions came pretty much to an end with the cases of *The People* v. *The Mayor of New York*, (2 *Hill*, 10.) and *In the Matter of Mount Morris Square*, (*Id.* 14.) In the former of these cases Judge Bronson said, "that a writ of certiorari only lies to inferior courts and officers who exer-

cise judicial powers;" and he disapproved of the case in the 20*th of Johnson*, and of all that class of cases where the writ had been held to lie to review the proceedings of municipal corporations, in laying out streets or making provision for public improvements, and the proceedings of ministerial officers and public bodies. But in the case of the *Matter of the Mount Morris Square*, Judge Cowen examined the question with great care, and with his accustomed research. He says, "the writ lies to inferior *courts* only," and cites *Bacon's Ab. Certiorari*, 13, and *Case of Rex* v. *Lloyd*, (*Cald. Cas.* 309,) where the writ was quashed because the order it was brought to review was not *judicial*. Judge Cowen discusses the question with much ability, and I think shows quite clearly that it was a departure from principle ever to have allowed this writ to go to review the proceedings of corporations and other public bodies or officers not acting judicially, and that the proper office of the writ is to review simply *judicial decisions* or determinations. He admits that the writ may go to assessors and other officers having power to assess and issue a warrant to levy money, for they are to a certain extent *judges*, and their determinations judicial; but he held "that this was outside of the cases which favor the writ." In 15 *Pick.* 243, the writ was disallowed, the court saying the acts sought to be inquired of were not judicial. The same view is asserted in the case of *The People* v. *the Board of Health of New York*, (33 *Barb.* 346,) in which the writ was quashed, Judge Ingraham saying, in giving the opinion of the court, "that he could not adopt the conclusion that it is in any sense proper to review the legislation of any body having authority to legislate, even when in the course of such legislation they might exceed the powers vested in them."

The writ has recently been allowed, without question, to correct errors of assessment in New York, in the cases of *The People* v. *Commissioners of Taxes for New York*, (23 *N. Y. Rep.* 192;) *The same, ex rel. Hoyt*, v. *The same*, (*Id.* 224,) and *The same, ex rel. Bank of Commerce*, v. *The*

same, (26 *id.* 163.) In this class of cases the act or decision of the assessors is regarded as *judicial*, and upon this ground the writ was allowed to go, and was sustained. The same objection applies to the proceedings of the town meeting of Nunda, and the resolution passed at such meeting. The resolution passed at such meeting was not a judicial act. This court can not appropriately affirm or reverse or set aside a mere resolution of a town meeting not resulting in any judicial action or decision.

The writ to the commissioners of taxes in New York was allowed while the roll was before them, after the final adjudication upon the assessment in question, and while they had the power to amend it, and conform it to the judgment of the court. The judgment rendered by the court of appeals in these cases was that the judgment should be reversed, (meaning the judgment of the supreme court affirming the assessment,) and that "the proceedings be remitted with a direction to correct the assessment roll." To sustain the writ, there has been quite a tendency to enlarge the sphere of judicial acts, and to regard almost every kind of official act requiring or involving the exercise of judgment or discretion as a judicial act. But this, I think, is a mistake. There is scarcely an act of any public officer or body, or of persons clothed with special powers by or under the authority of law, that does not require and involve more or less discretion. It is simply absurd to call all such acts *judicial*, and apply to them the principles which govern the review of the proceedings of *courts* and of judicial officers.

But if a writ of certiorari will lie to a board of supervisors—and I think it would upon the same principle that it goes to assessors—this writ is at least premature. The writ can not go to a court or inferior tribunal till the proceedings instituted or pending in such court or tribunal are completed or ended. It will only lie to bring up the *final adjudication* of such court or tribunal. (20 *John.* 80. *Lynde* v. *Noble*, 3 *Abb.* 194. 26 *Barb.* 637.)

The final determination of assessors fixes the amount and valuation of property upon which a taxpayer is to be taxed. It is an *adjudication* after examination of the person to be assessed, if he appears before them, in respect to the extent of the property possessed by him and liable to taxation. So when a board of supervisors finally assess, lay and levy a tax, it is an adjudication that the persons named in the assessment roll are liable to pay the tax assessed to him, and it is a final judgment or adjudication against him, on the subject. To review such final judgment or adjudication, I have no doubt that a certiorari will lie. Such writ will bring up as part of the record all the proceedings which enter into the final adjudication. If the supervisors in this case had proceeded to assess, lay and levy a tax upon the taxpayers of Livingston county, under the resolutions passed August 3 and September 2 aforesaid, a writ of certiorari would clearly have lain to them. Such writ would have brought up their resolutions for review, and all other resolutions, acts or proceedings entering into and forming part of the judgment or adjudication, or which in any manner became part of the jurisdictional facts upon which such adjudication was founded. The question whether a writ of certiorari shall issue in such case would be one addressed to the discretion of the court alone. It is not a writ of right, and should not be granted to boards of supervisors to remove proceedings in assessing the general town and county taxes. (*The People* v. *The Supervisors of Alleghany*, 15 *Wend.* 198. *The same* v. *The Supervisors of Queens*, 1 *Hill*, 200.) But I have no doubt of the power. Quite clearly the writ will not lie to bring up the incipient resolutions or proceedings upon which a tax may ultimately be based, before any tax is laid or any final adjudication or determination is had upon the matter. The court clearly can not reverse, quash or set aside proceedings not before it, and can not adjudge proceedings invalid which have not been had. It can not anticipate the decision or adjudication of the subordinate tribunal before whom special

proceedings are pending, and annul them in advance. For these reasons I think the writ of certiorari issued in this case should be quashed.

[Monroe General Term, December 23, 1864. *J. C. Smith, Welles* and *E. Darwin Smith*, Justices.]

John Magee and others *vs.* George D. Cutler and seventeen others, Supervisors of Livingston county.

43 239
43 300
71 355
56 73
80 57
33b 137
64a 626

A suit in equity against supervisors of a county, to restrain them by a perpetual injunction from imposing a tax which will be a lien upon the plaintiffs' lands, and a cloud upon the title thereto, can not be sustained upon the ground that it will prevent a multiplicity of suits, where it does not appear that any one has sued the plaintiffs, or threatened to sue them in respect to such tax.

In such a case, if the proceedings to levy and impose the tax are illegal and invalid upon the face of the record, a single action at the suit of the people, upon a common law certiorari, after the proceedings of the supervisors to levy such tax are completed, will bring up the whole proceedings for review, when they can be reviewed, or set aside and quashed. The persons whose lands are subject to the tax can also defend themselves, in a suit at law against them, and the proceedings will not constitute an apparent cloud upon their title.

Nor is it a ground for equitable interference that the proceedings to impose the tax are, or appear to be, fair and valid upon their face, and that extrinsic facts are necessary to be proved in order to establish the invalidity of bonds issued by the supervisors in pursuance of the resolution for the levying of the tax, which can not be brought before the court on a writ of certiorari.

Inasmuch as a certiorari goes to review a judicial act—a consummated judicial decision—a proper return to such writ will bring up, as a part of the record, whatever entered into, or was necessarily passed upon, in the decision of the question sought to be reviewed.

At a meeting of the board of supervisors of the county of L., on the 3d day of August, 1864, a resolution was adopted in pursuance of chapter 8 of the laws of 1864, authorizing the levying of a tax to pay bounties to volunteers, by which the county treasurer was authorized to issue the bonds of the county to the several supervisors, to pay bounties to recruits that should be mustered into the service of the United States to the credit of the re-

spective towns, under the president's call of July 18, 1864, for 500,000 men. By another resolution of said board, passed on the 3d of September, 1864, each town in the county was authorized to increase its bounties to $1,000, and the treasurer was empowered to issue bonds to the respective supervisors at the increased rate. On the 16th of September, 1864, a draft was made, to fill the quota of the town of G. under the said call, amounting to twenty-nine men, which produced nineteen men, who, after inspection, were accepted on such quota. On the 23d day of the same month a special town meeting was held, in said town of G. at which it was resolved to pay a bounty not exceeding $1000, and that the same be assessed and collected from the taxable property of said town. Subsequently, the supervisor of said town demanded and received from the county treasurer twenty-nine bonds for $1000 each, which were negotiated by him and the avails used for the purpose of procuring substitutes for the persons so drafted from that town.

Held, that the supervisor of the town of G. was duly empowered to receive from the county treasurer the bonds of the county, and to apply such bonds, or the proceeds thereof, in paying bounties to volunteers to fill the quota of the town; and that the draft, which took place on the 16th of September, did not render such use or appropriation of the bonds or the proceeds thereof unlawful by filling the quota of the town, so that no volunteers could thereafter be legally called for or required from said town.

Held, also, that in respect to the manner in which the supervisor of G. procured volunteers to fill the quota of that town, the spirit and intent of the statute, and of the resolutions of the board of supervisors and of the town meeting, were fulfilled and complied with.

One who freely enlists in the place of another, and becomes his substitute of his own free will and accord, is a volunteer, within the spirit and intent of the statute.

A resolution of a board of supervisors, providing for the issuing of county bonds to each supervisor who may call for the same, to pay a bounty of a specified amount to each recruit that shall be mustered into the service of the United States, to the credit of their respective towns, is a provision to issue the bonds upon the credit of the county; and the bonds issued under it are a county charge, and binding on the whole county.

Such bonds, being issued under the authority of the board of supervisors, upon the credit of the county, are valid bonds of the county; and it is the right and duty of the board of supervisors to provide accordingly for their payment, as legitmate public debts of the county.

Freeholders and tax payers of a town, owning lands in severalty, but not having any common property, can not join in a suit in equity to restrain the collection of a tax assessed upon all the lands in the town. They have no common interest in the subject in controversy, to entitle them to join in the action.

When a county is to be sued, the action must be against the board of supervisors, and not against the individual members.

Magee *v.* Cutler.

MOTION to dissolve an injunction upon the complaint and affidavits. The complaint sets forth that the plaintiffs, seven in number, are residents, freeholders and tax payers of the town of Groveland, in the county of Livingston, having both real and personal property liable to assessment and levy for the payment of taxes; that the action is one of a common or general interest to many persons, and that such persons are so numerous that it is impracticable to make them all parties; and that the action is prosecuted for their benefit as well as that of the plaintiffs; that the defendants named are the supervisors of the several towns of the said county of Livingston. The complaint further states that on the 3d day of August, 1864, at a meeting of the supervisors of said county, duly convened and held, a resolution was adopted in pursuance of chapter 8 of the laws passed at the session of 1864, by which the treasurer of Livingston county was authorized to issue the bonds of said county to each supervisor who might call for them, to pay not exceeding $300 to each recruit that should be mustered into the service of the United States to the credit of his town, for the term of three years, and not exceeding $200 to each recruit mustered for one year, under the call of the president of the United States for 500,000 men, issued on the 18th day of July of said year. That each supervisor was to be the receiving and disbursing agent of his town, and to draw from the treasurer such an amount as would pay the quota of his town at the said rates; and that by another resolution passed by said board on the 3d of September thereafter, each town in the county was authorized to increase its bounty to a sum not exceeding $1000, and authorizing the treasurer to issue bonds to the respective supervisors at that rate, subject to the resolutions of the 3d of August aforesaid.

The complaint further states, that on the 23d of September, thereafter, a special town meeting was held in said town of Groveland, at which it was resolved to pay a bounty not

exceeding $1000, and that the same be assessed and collected from the taxable property of said town. That said town of Groveland is a sub-military district of the 25th congressional district of this state, and as such was liable to a draft for the quota of twenty-nine men. That on the 16th of September, preceding said town meeting, a draft was made to fill said quota, of fifty-seven persons, of which the first twenty-nine who should, upon inspection, be found to be able bodied men, became liable to military service to fill said quota. That nineteen of said men were duly inspected and found able bodied, and were accepted on said quota, and that of the residue drafted more than the requisite number are able bodied and liable to do military duty. That after such town meeting the supervisor of said town demanded and received of the county treasurer twenty-nine bonds, drawn in pursuance of the said resolutions of the board of supervisors, for $1000 each, and said bonds were negotiated by him and the avails used for the purpose of procuring substitutes for the persons so drafted from said town; the said supervisor using said bonds or the avails thereof for the said purpose under the pretense of procuring volunteers. That the board of supervisors have taken the preliminary steps to allow said twenty-nine bonds either as a claim against the said county of Livingston or the said town of Groveland. And the complaint avers that it is the purpose of the defendants, composing such board of supervisors and acting as a board, to assess, impose and levy the amount of said bonds either upon the taxable property of the said county or of the said town of Groveland. The complaint alleges that the defendants, as such board of supervisors, have under consideration the question of imposing and levying the amount of all the county bonds issued to the various towns of said county under said resolutions and in pursuance of the action of said towns at special town meetings, including the bonds issued to said town of Groveland, upon the taxable property of the county, or assessing the same thereon according to the equalized valua-

tion of said county. That the amount of said bonds is about $750,000, and that such bonds are issued in due form of law. That eleven towns of said county would pay a less sum respectively by such equalization than said towns would pay in accordance with said resolutions of said board, and such sum in the aggregate would amount to about $140,000, which would be chargeable to the remaining six towns of said county, in addition to what such towns would be liable to pay under said resolutions and the action of said towns; and that by such equalization the said town of Groveland, if charged with the amount of said twenty-nine bonds, would pay about $10,000 more than such amount. The complaint further states, that notwithstanding the draft so made for the said town of Groveland, the said supervisors are proceeding to impose such additional sum of $10,000 on said town, in addition to the sum of $23,350, for the bonds issued to the supervisor of said town and sold by him, and have already, by a vote of said board, imposed and assessed about $200,000 of such $750,000 on the taxable property of said county; and that in such sum of $200,000 is included the proportional part of the amount due on the bonds so issued to the said town of Groveland.

The complaint further states, that unless this court shall grant to the plaintiffs, and others so interested, equitable relief, great and irreparable injury will be occasioned, among others, for the following reasons: First, that if the plaintiffs delay action till the tax rolls are completed and warrants issued for their collection, their attempt to contest the legality of such assessment would delay the collection of a large amount of taxes, the legality of which is unquestioned, to the great public detriment. Second, that it might be impossible to prevent the collection of such taxes when so illegally imposed, and in such case the enforcement thereof would lead to a multiplicity of suits. Third, if such illegal tax was collected by being imposed on the taxable property of the county, then it would be difficult to follow and distinguish

it after it had been intermingled with other funds. Fourth, that the proceedings before such board of supervisors, as well as the proceedings of such town meetings, appear fair and valid upon their face, and that extrinsic facts are necessary to be proved, in order to establish the invalidity of such bonds so issued for the town of Groveland, which can not be brought before the court by the writ of certiorari, viz. the proceedings of the board of enrollment aforesaid. Fifth, that unless the court grants such equitable relief, such illegal taxes, by means of the proceedings had and to be had by and before such board of supervisors, will become a lien upon the land of the said plaintiffs and other parties, as aforesaid, and a cloud upon the title thereof.

The complaint prays judgment that such board of supervisors be perpetually enjoined from assessing, imposing or levying upon the taxable property of the town of Groveland, or upon the taxable property of the county of Livingston, the amount of the said bonds so issued to or for said towns, or any part thereof, or from enforcing or attempting to enforce the collection of such bonds or the amount thereof, upon the taxable property of the said town of Groveland or the said county of Livingston.

The complaint was duly verified, and several affidavits of the plaintiffs annexed; and an injunction was duly granted thereupon by one of the justices of this court, and was served. The defendants moved, at a special term, to dissolve such injunction on said complaint and affidavits, and said motion was ordered to stand over and be heard at a general term. The defendants controverted several of the allegations of the complaint, and stated and alleged that the twenty-nine bonds issued to the supervisor of Groveland were all used, or the proceeds thereof, to procure recruits or volunteers to fill the quota of said town; that the said quota was all filled by volunteers procured by the supervisor of said town, to whom the state and government bounty was also paid; that such volunteers were received by the government and were

accepted and mustered into the military service in full of the quota of said town; and it alleged that none of the persons drafted for said town were ever accepted or mustered into the service as they were required to be, by the proper officer. And the plaintiffs showed, also, by the affidavits and the instructions of the provost marshal and other officers of the general government, that volunteers were customarily received in lieu of drafted men up to the time when the men are actually mustered into the service; and such were the general rule and instructions governing the subject, from the proper officers and authorities of the general government.

The affidavits also showed that on the 30th of November, 1864, at the annual meeting of the board of supervisors of said county, a resolution was duly passed by said board, directing that there be assessed and levied and collected upon the taxable property of the said county the sum of ——— dollars, to be applied by the county treasurer to the payment of the Livingston county bonds falling due in February, 1865, issued for the payment of bounties to volunteers to fill the quota of Livingston county under the call of the president for 500,000 men, of July 18, 1864; and that the same be assessed, levied and collected as other county taxes are assessed, levied and collected.

The defendants also read an affidavit of the clerk of the board of supervisors, stating that no notice of the proceedings of any town meeting of any of the towns of said county, in relation to the payment of town bounties to volunteers under the call for 500,000 men aforesaid, was ever presented to said clerk of said board; nor had copies of any of the proceedings of said town meetings ever been presented to or filed with him as such clerk, or been presented to said board, or any notice thereof given at any of its meetings since July 18, 1864, or served upon said board.

A. J. Abbott and *T. R. Strong*, for the defendants.

G. F. Danforth, for the plaintiffs.

By the Court, E. DARWIN SMITH, J. This is an action in equity. The complaint invokes the equitable powers of this court to restrain by a perpetual injunction the imposition of a tax which will be a lien upon the plaintiffs' lands and a cloud upon their title thereto. An injunction is the peculiar process of a court of equity, and it can only issue where a party to an action is entitled to equitable relief. Section 219 of the code provides that "when it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff, or when during the litigation it shall appear that the defendant is doing, or threatens, or is about to do or procure some act to be done in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to stay such act." The first inquiry that meets us in the examination of the case is whether the plaintiffs make out a case where they would be entitled to equitable relief; for the relief intended by this section of the code, means *such* relief, such as pertains to a court of equity, and is exclusively given by such courts. The plaintiffs do not question the validity of the resolutions passed by the board of supervisors on the 3d of August, and on the 2d day of September, set out in their complaint; nor do they deny the legality of the proceedings of the special town meeting held in the town of Groveland on the 23d of September, also mentioned in the complaint; and if they did, it is very clear that we can not in this suit review those proceedings. It is well settled, and has been ever since the decision in the court for the correction of errors in the case of *The Mayor &c. of Brooklyn* v. *Meserole*, (26 *Wend.* 132,) that a court of equity has no such jurisdiction. Chancellor Kent, in *Mogers* v. *Smedly*, (6 *John. Ch. R.* 31,) said, "I

can not find by any statute or procedent or practice, that it belongs to the jurisdiction of chancery, as a court of equity, to review or control the determination of the supervisors, but that the review and correction of all errors, mistakes and abuses in the exercise of the powers of subordinate public jurisdictions, and in the official acts of public officers, belongs to the supreme court, and has always been a matter of legal and not of equitable cognizance." The same doctrine has been repeatedly asserted, since, in *Wiggin* v. *The Mayor of New York*, (9 *Paige*, 16, 388,) *Heywood* v. *The City of Buffalo*, (4 *Kernan*, 534,) and in *Susquehannah Bank* v. *The Supervisors of Broome Co.* (25 *N. Y. Rep.* 314.)

But the case of *Heywood* v. *The City of Buffalo*, which was a very carefully considered case, and the last in the court of appeals where the question was distinctly raised, makes three exceptions to the general rule as follows: "First, where the proceedings in the subordinate tribunal will necessarily lead to a multiplicity of actions. Second, where they lead to the commission of irreparable injury to the freehold. Third, where the claim of the adverse party to the land is valid upon the face of the instrument, or the proceedings sought to be set aside, and extrinsic facts are necessary to be proved to establish the invalidity or illegality." The plaintiffs in this complaint and in the argument of their counsel present two of the above mentioned grounds of jurisdiction, the first and the third. Actions to prevent litigation and a multiplicity of suits are not ordinarily entertained till the plaintiff has established his right at law, and is nevertheless in danger of further suits by parties who controvert such right, or where the parties who controvert his right at law are so numerous as to render an issue under the directions of the court indispensable to embrace all the parties concerned, and to save a multiplicity of suits. (*Eldridge* v. *Hill*, 2 *John. Ch.* 281.)

In some cases the courts of equity having acquired jurisdiction upon other grounds, have retained it for the purpose of relief, to prevent a multiplicity of suits. (1 *Story Eq.* 64, *and*

Fonblanque's Eq. B. 1, *chapter* 1.) The plaintiffs here were not subject to any peril of litigation from adverse parties. No person has sued them, or threatened to do so, in respect to the tax in question ; and if the tax were levied and collected, a single action commenced by either of them would settle the controversy, so far as we can see.

This action, therefore, can not be sustained upon the ground that it will prevent a multiplicity of suits. The plaintiffs have no grievance to complain of on this head, and none which calls for any preventive remedy from a court of equity. If the proceedings to levy and impose the taxes in question are illegal and invalid upon the face of the record, a single action at the suit of the people upon common law certiorari, after the proceedings of the supervisors are completed and consummated, to lay and levy such tax, would undoubtedly bring up the whole proceedings for review, when they could be reversed and set aside or quashed, and the plaintiffs could also easily defend themselves in a suit at law against them, and they would constitute no apparent cloud upon their title.

The other ground for the equitable interference of this court suggested is, that the proceedings to impose such tax are, or appear to be, fair and valid upon their face, and that extrinsic facts are necessary to be proved in order to establish the invalidity of the bonds issued to the supervisor of Groveland, which can not be brought before the court on writ of *certiorari*, to wit, the proceedings of the board of enrollment set out and detailed in the same complaint. It is true that a common law certiorari only reviews the record; but it is quite a question in many cases, what constitutes the record. There has been much contrariety of opinion on the question, what is to be deemed embraced within the record, and returned as part of it in these cases.

I apprehend that as the certiorari goes to review a judicial act—a consummated judicial decision—a proper return to such writ will bring up as part of the record, whatever entered

into, or was necessarily passed upon, in the decision of the question sought to be reviewed. *In Mullins* v. *The People*, (24 *N. Y. Rep.* 399,) this question was discussed by Judge Selden, and the court held that in the case of a summary conviction the evidence must be returned, (*See also the People* v. *Goodwin*, 1 *Seld.* 568.) But assuming that the plaintiffs are right upon this question, and that upon certiorari the proceedings upon the enrollment can not be brought before the court, I will consider the question whether these proceedings as they appear before us, present any matter for equitable relief to the plaintiffs within the exceptions to the rule, as stated by Judge Johnson in *Haywood* v. *The City of Buffalo*, (*supra.*)

Assuming that the resolutions of the board of supervisors of the 3d of August and 3d of September, and the proceedings of the special town meeting of Groveland, were valid, and I think there can be no doubt of their validity, then the supervisor of Groveland was duly empowered to receive from the county treasurer the bonds of the county, such bonds, or the proceeds thereof, to be used in paying bounties to volunteers to fill the quota of said town, unless the intervention of the draft on the 16th of September rendered such use or appropriation of said bonds, or the proceeds thereof, unlawful, or, in other words, had filled the quota of said town so that no volunteers were thereafter legally called for, or could be required from said town. This is the argument and claim of the plaintiffs and their counsel.

The 22d section of the act of 1864, (*ch.* 8, *p.* 25 *of Session Laws*,) expressly authorized the board of supervisors, at any meeting of said board duly called, to adopt resolutions to provide for raising money upon the credit of their respective counties for the use of said county, or upon the credit of any city or town thereof for the sole use of said city or town; or to impose a tax upon the taxable property of their respective counties, for the use of said county, or upon any town or city *for the purpose of paying* volunteers into the military or

naval service of the United States during the war, &c. The money to be raised under this act was to be expended in paying bounties to volunteers. It could not be lawfully used for any other purpose, except as provided in said act, in furnishing temporary relief to the families of volunteers, and paying the incidental expenses of such volunteering and of raising such moneys.

The supervisor of the town of Groveland, in his affidavit, states that soon after the special town meeting held in that town, he commenced recruiting for volunteers to fill the quota of said town; that he recruited twenty-eight men, and one was credited said town from an excess on the former quota; that he received the bonds of the county from the treasurer, pursuant to the resolutions of the board of the 3d of August and 2d of September; that he paid all the proceeds of such bonds, $23,350, in filling the quota of said town, and that no part or portion of said bonds, or the proceeds thereof, was used for any other purpose, except in the payment of, or in procuring money for the payment of volunteers to fill said quota. That the twenty-eight men recruited by him were duly mustered into the service of the United States as soldiers and volunteers, and each and every one of them was received and credited upon the quota of the said town of Groveland as a volunteer, and received the bounty paid by the United States government to volunteers, as he is informed and believes, and that no one of said twenty-eight men was mustered as a substitute for any person.

I do not see why this is not a complete compliance with the statute, and the resolutions of the board of supervisors and of the town meeting of Groveland. The supervisor has, according to his statement, faithfully performed his duty, and faithfully disbursed the public money according to the express provisions of the law; and I can not see why the bonds he received and used for this purpose, in the manner stated by him, were not properly received, lawfully negotiated, and the proceeds honestly applied. But it is said that

while this is apparently so, yet that these moneys were really expended to procure substitutes for the men drafted on the 16th of September to fill the quota of said town, and that after such draft volunteers could not be lawfully received in discharge of such drafted men, except as substitutes, and that the money received from these bonds could not be lawfully paid for substitutes. The supervisor says that not one of the twenty-eight men recruited by him was received or mustered as a substitute for any other person; that no portion of the bonds or money received from them was used to procure substitutes. While this is or may be so, it is impossible not to see that the volunteers recruited by him did serve the purpose, as a whole, of supplying the place of the twenty-eight drafted men from said town, and saved any of such drafted men from the necessity of going into the military service of the country. The supervisor means, undoubtedly, that not one of the twenty-eight men was recruited, received or mustered into service specifically for any other particular man, or for any one individual of the drafted men. But I have no doubt that the spirit and intent of the statute, and of the resolutions of the board of supervisors and of the town meetings of Groveland, was entirely fulfilled and complied with in the manner in which the supervisor procured volunteers to fill the quota of said town. Call the twenty-eight recruits volunteers or substitutes for drafted men at large, and the law is not violated, and the resolutions aforesaid are fully carried out and executed according to their true intent and spirit. The town of Groveland has had its quota filled without taking a single drafted man from the town. This was the object which the town really had in view in its resolution, and desired to secure. This was what the resolution of the board of supervisors and the act of the legislature in question were passed to accomplish. The purpose of the legislature and the supervisors, and of the inhabitants of Groveland, so far as pertains to the action of their town, was to secure for the military service of the country soldiers who

should freely enlist and voluntarily enter the army of the United States, instead of being compelled to resort to a compulsory draft. This act and all the acts referred to were passed, and all the resolutions and acts in the execution of said statute were in furtherance of this policy, and of these purposes. I can not see why a man who freely enlists in the place of another, and becomes his substitute of his own free will and accord, is not a volunteer within the spirit and intent of the act of the legislature, as much as any other man who enlists under any other circumstances. The draft is used by the government because men are required, but it obviously prefers volunteers to drafted men, and the draft serves to stimulate volunteering.

I can not see why this is not entirely proper. A substitute, I think, is a volunteer according to the spirit and intent of the statute, and I can not see how it can be held otherwise. The town of Groveland and the county has had the benefit of this doctrine in the practice of the government, and has no reason to complain of any injustice in this particular; and I think the law has in no respect been violated in the manner in which the town was relieved from the duty to send twenty-eight of its citizens against their will into the military service of the country. If I am right in this view, the extrinsic fact arising out of this enrollment and the questions connected with it present no basis for the equitable interference of this court, or basis of jurisdiction in this action, within the rule stated in *Haywood* v. *The City of Buffalo.*

But the plaintiffs present another ground for equitable relief in this suit. They claim that the proceedings of the town of Groveland, and of the other towns of the county of Livingston, under the resolutions of the 3d of August and 2d of September, create the right on the part of the several towns to be taxed only for the amount of the bonds issued to the supervisors of the respective towns, and allege that the board of supervisors are proceeding to treat all such bonds as

a county charge, and to impose and levy upon the taxable property of the county at large a tax sufficient to pay the same as they mature, and have already, by a vote of the board, imposed and assessed about the sum of $200,000 on the taxable property of said county, which will impose an increased tax on the said town of Groveland of about $16,000, over and above the $23,350 for which the town would be liable if the bonds issued to the supervisor of said town should be held valid and separately chargeable.

It is claimed that these facts or, some of them, are essential to present the questions upon a certiorari, and would be *dehors* the record. Upon a certiorari now directed to the supervisors, they would be required to return the assessment roll if it is complete, and the warrant annexed thereto, together with the resolutions of the 3d of August, the 2d of September, and of the 30th of November; and all other resolutions and proceedings of said board, showing jurisdiction to impose said tax upon the county at large. But I have some doubt whether a writ of certiorari to the board of supervisors would bring up any of the proceedings of the towns respectively, had under the resolutions of the 3d of August and 2d of September. These proceedings would not appear on the face of the record of the board of supervisors, as in their determination to impose a tax upon the county at large, for all the bonds issued under these resolutions, the proceedings and actions of the respective towns of said county under said resolutions are practically ignored. In this view I do not see how we can avoid passing upon the question whether the board of supervisors are empowered or not to impose a tax upon the county at large for said bonds, as a county charge.

Section 22 of the act of 1864, empowers the board of supervisors of each county to provide for raising money to pay bounties to volunteers in two ways: One upon the credit of the county, and the other upon the credit of the town. They could raise money by borrowing on the credit of the county or of the respective towns, or by levying or imposing a tax

upon the taxable property of their respective counties, or upon the towns or cities of their counties for such purpose. The board of supervisors were entrusted with the whole subject of declaring the manner and mode of raising such moneys in their discretion.

The resolution of the board of supervisors, of the 3d of August, provides for the issue of county bonds to each supervisor who might call for the same, to pay a bounty of $300 to each recruit that should be mustered into the service of the United States to the credit of their respective towns, for the term of three years, and not exceeding $200 to each recruit mustered for one year, and $25 premium or expense money for each recruit furnished for one year. This I think is a provision to issue these bonds upon the credit of the county, and the bonds issued under it are a county charge. The money is to be paid to recruits credited to the respective towns, but it is not borrowed or advanced on the credit of the towns. The money paid is raised on these bonds for the county; when raised it was county money. The respective towns can not, I think, be lawfully charged for such money, or taxed for it individually. The resolution did not provide for the creation of town debts, or for the issue of town bonds.

The supervisors, in form and in legal effect, provided in and by such resolutions to raise money upon the credit of their county for the use of said county. They did not provide under the act "to raise money upon the credit of the towns of this county or of any towns thereof." They propose to raise money and allow the respective towns to draw an equal amount thereof *pro rata* to pay bounties to volunteers who should be recruited in the respective towns, or for such towns, and be received on its quota in lieu of drafted men as volunteers into the military service of the country. There are not in this resolution any apt or appopriate terms, or words, or phraseology adapted to create a town debt or raise money on the credit of the respective towns of said county. I entirely concur, on this point, with the views expressed in

the opinion of my brother J. C. Smith, in his opinion upon the application to dissolve the injunction issued in the case of the town of Ossian, arising under the act and resolution in this same county,(*a*) that the bonds authorized and issued under the resolution in question, are county bonds issued on the credit of the county solely and are, as such, binding on the whole county.

(*a*) The case referred to is the following:

JAMES FAULKNER and others *vs.* CHAUNCEY METCALF, Treasurer of the county of Livingston.

MOTION to vacate an injunction order, granted by the county judge of Livingston, restraining the defendant from issuing to the supervisor of the town of Ossian, in that county, certain bonds of said county for the purpose of paying bounties to volunteers under the late call of the president of the United States for 500,000 men.

The papers presented on the motion, consisting of the complaint which is verified, and affidavits on each side, establish the following facts: The board of supervisors of Livingston county, at a special meeting held on the 3d day of August, 1864, adopted the following resolution:

"Whereas the president of the United States did, on the 18th of July, 1864, call for 500,000 volunteers; therefore, resolved, that the treasurer of the county of Livingston be authorized to issue the bonds of said county, bearing annual interest, to each supervisor who may call for the same, and borrow money on such bonds for such supervisors as may call for money, to pay a bounty, not exceeding $300, to each recruit that shall be mustered into the service of the United States, to the credit of their respective towns for the term of three years; and not exceeding $200 to each recruit mustered for one year under said call; and $25 premium, or expense money, for each recruit furnished for one or three years."

At another special meeting, held on the 2d of September, 1864, the said board adopted the following resolution:

"Resolved, That each town in the county of Livingston be authorized to increase its bounty to a sum not sxceeding $1000, and that the treasurer of this county be authorized to issue county bonds as each supervisor may call for them, subject to the same regulations as prescribed by the resolution of this board passed August 3, 1864."

At a special meeting of the electors of the town of Ossian, held on the 22d of August, 1864, resolutions were passed by a majority of the electors present and voting, authorizing said town (1.) to pay a bounty of $300 for recruits for one year, in addition to the bounties therefor authorized by the board of supervisors, the money to be borrowed on town bonds;

The resolution of the 3d of September does not militate against this view, but to my mind strengthens it. That resolution allowed the town to increase the bounty to $1000. This treated the towns all alike. It left them at liberty to pay bounties to a common amount of $1000 and no more. If the supervisors had contemplated the creation of town

(2.) to pay all bounties to any person furnishing an accepted substitute credited on the quota of the town; (3.) to pay said bounties to each drafted man entering the service; and (4.) authorizing the supervisor to use $100 extra bounty, if necessary, to fill the quota of the town; the money to be raised in the same manner as the money to pay the $300 town bounty.

At another special town meeting of the electors of said town, held on the 14th of September, 1864, it was voted by a majority of 27 votes out of 133, that no money should be raised upon the credit of the town for the purposes aforesaid.

At a subsequent special meeting of the electors of said town, held on the 26th of September, 1864, the following resolution was adopted by a vote of 113 to 75:

"Resolved, That the town of Ossian increase its bounty for volunteers to fill its quota of thirty under the call of July 18, 1864, for 500,000 men, not exceeding $900 for each recruit; and that the same sum paid to recruits be paid to persons volunteering as substitutes, or to the person procuring the same, provided that such substitute is counted on the quota of the town, and that the bonds for the same be issued payable in three yearly installments, commencing from the first of February next, first installment payable on the first of February next."

James C. Smith, J. The evidence before me is somewhat conflicting in respect to what took place at the meeting of the 26th of September, but I consider the fact satisfactorily established, that the sense of the meeting was fairly and legally taken and declared upon the question whether the last resolution above transcribed should be adopted, and that the result of the vote was as above stated.

The plaintiffs allege in their complaint that they are taxpayers in the town of Ossian; that the defendant is the treasurer of the county of Livingston; and that the number of men required to be furnished by the town of Ossian under the call for volunteers is thirty.

They also allege in the complaint—and this is the *gist* of their action—that the proceedings of the said several special town meetings are illegal and invalid, and do not authorize the county treasurer to issue the bonds of the county to the supervisor of said town; but that, nevertheless, said supervisor is about to call upon the treasurer to deliver to him the bonds of said

debts, why restrain the towns in the amount they should respectively pay for the bounties? This resolution implies upon its face that the towns are to draw from a common fund, the funds of the county, to pay the bounties, and therefore, they are to be treated equally, and each limited to a given sum for the amount, so to be drawn or received from the treasurer.

county to the amount of $900 for each man necessary to be furnished by said town, and the supervisor intends, when the bonds are delivered to him, to raise money thereon to pay bounties to volunteers or drafted men applying upon the quota of said town, "making [such is the language of the complaint] the amount so paid a tax upon the property of said town."

The injunction restrains the defendant from issuing to the supervisor of Ossian bonds of the county to a greater amount than nine thousand seven hundred and fifty dollars; thus recognizing the right of the treasurer to issue to such supervisor, and of the latter to receive and use, in payment of bounties, county bonds to the amount of three hundred and twenty-five dollars for each man of the quota of said town, in pursuance of the resolution of the board of supervisors, adopted in August, but denying the right to issue or receive bonds for the payment of the increased bounties provided for by the resolution passed by the board in September.

I have examined the case thus presented, with the care due to the importance of the questions and interests involved in it, and I am of opinion that it does not justify the interference of a court of equity if that injunction should be dissolved. I will state briefly the reasons which lead me to this conclusion.

The plaintiffs, as taxpayers of the town of Ossian, ask the court to prevent the issuing of the bonds in question to the supervisor of that town, for the reason that if they shall be thus issued, and issued as proposed by such supervisor, a debt, illegal in reality but apparently legal, will thereby be created against said town, which the taxpayers thereof will be liable to pay.

The groundwork of this claim, as has been already stated, is that the proceedings of the electors of said town at the several special town meetings are illegal and invalid. In my judgment, the proceedings of those meetings are not material to the validity of the bonds, or the right of the defendant to issue them, or of the supervisor of Ossian to receive them.

Assuming, for the purpose of the argument, the invalidity of the action of the several town meetings, it is difficult to perceive how the issuing of the county bonds to the supervisor of the town, in pursuance of the resolution of the board of supervisors, can create any actual or apparent liability against the town. The resolutions of the board of supervisors, authorizing the treasurer to issue said bonds, were adopted in pursuance of the provisions of section 22, chapter 8 of the laws of 1864. (*Sess. Laws*, 1864, *p.* 24.) It will be

I am very clear in the opinion that no town debt was created under their resolution for any of the bonds issued to the respective supervisors of said county. The bonds being issued under the authority of the board of supervisors upon the credit of the county, are valid bonds of the county, and it is the right and duty of the board of supervisors of that county

seen by referring to that section that it authorizes the boards of supervisors of the several counties in this state to adopt resolutions to provide for raising money for the purpose of paying bounties to volunteers, and for certain other purposes therein specified, either (1.) by loan upon the credit or tax upon the property of their respective *counties*, or (2.) by a loan upon the credit or tax upon the property of any *city or town* thereof. These two modes of procedure are separate and distinct each from the other. The board may raise money in the first mode by their own independent action; in the second mode their action is insufficient, without the concurrent vote of the town or city whose credit is pledged or property taxed.

Again, money raised in the first mode can only be devoted to the *use of the county;* money raised in the second mode must be appropriated to the sole use of the city or town upon whose credit or property it is raised. The board of supervisors of Livingston expressly provided, by each of the resolutions in question, that the moneys thereby voted should be raised by the issuing of *county bonds*, that is, upon the credit of the county. No other mode was provided. They did not propose a tax upon the several towns, or the issuing of town bonds. The resolution increasing the bounty to one thousand dollars, and providing for raising it upon the credit of the county, obviated all necessity for action by any town for the purpose of raising money upon its own credit, unless it proposed to pay more than one thousand dollars bounty to each man.

The conclusion is unavoidable, that as the board had power independently of town action, to fix the amount of bounties for the whole quota of the county, and to provide for raising the entire sum on the credit of the county, and as they fully and properly exercised that power by adopting the resolutions in question, it is not only the right but the duty of the treasurer to issue and deliver to the supervisor of Ossian the amount of bonds in controversy, as directed by the resolutions. No charge will be created thereby against the town, and the plaintiffs, as taxpayers of that town, have no cause of complaint.

In coming to this conclusion I have not overlooked the provisions of the resolution of September 2, authorizing each town in the county "to increase its bounty to a sum not exceeding $1000;" nor have I failed to give attention to the opinion of the learned judge who granted the injunction, to the effect that this clause "contemplated the action provided by the statute, and

to provide accordingly for their payment as legitimate public debts of the county. It is urged that as the towns are each sub-military districts from which respectively the quota recruits was called, or in or from which the draft was to be made, the money raised by these bonds could not legally be raised from the county at large, because the money can not

requires a vote of the town that the sum to be raised shall be a charge upon the property of the town." The judge expressed serious doubt as to the correctness of this view, and evidently adopted it with reluctance.

Looking at the language of the two resolutions—and by their language alone can their meaning be judicially ascertained—I can not doubt that the only intention legally perceptible on the face of the resolutions is that which I have already stated, to wit, that the entire amount of bounty money, not exceeding one thousand dollars a man, should be raised on the credit of the county, and that it was not contemplated that the towns should take any action, except to indicate what sum, not exceeding that amount, they would respectively require to fill their quota. Even that action was not essential to the validity of the bonds; but if it were, the resolution adopted by the electors of Ossian, at the special town meeting on the 26th of September, was unquestionably sufficient for that purpose.

It is not material, in this view of the case, to consider whether the resolution last referred to did or did not amount to a vote that the money to pay the increased bounties should be raised upon the credit or by a tax upon the property of the town. If it be conceded, as claimed by the plaintiffs, that the electors merely voted that the bounty for volunteers credited to that town should not exceed nine hundred dollars, and did not vote to make it a town charge, that fact is a very clear indication that they understood the last resolution of the board to provide for raising the whole amount of bounty money on the credit of the county. That such was their understanding of the resolution seems to be further evinced by the fact that, after its adoption by the board, the electors voted that no bounty money should be raised on the credit of the town, although before its adoption they had voted to raise a bounty on the credit of the town, in addition to the county bounty provided for by the resolution of the 3d of August. It is also manifest, in this view of the case, that the proceedings of the special town meeting of September 26 are not open to the objection made by the plaintiffs, that the power of the electors over the subject matter of those proceedings had been exhausted at a previous meeting. They then, for the first time, took the action contemplated by the resolution of the board of September 2.

The views above expressed, dispose of the whole case. It may be well, however, to notice a point raised by the allegation in the complaint, that the supervisor of Ossian intends, with the money to be raised on the bonds, "to

be claimed or termed raised for "the use of the county," since no volunteers or recruits are called from the county as such. The legislature has settled this question.

It treats in the act the counties as they are, distinct political organizations of the state, and authorizes the supervisors thereof to provide to pay bounties for volunteers from the limits of such counties. It has thus declared, in legal effect, that money raised by any county under the authority of the board of supervisors of such county to pay bounties to volunteers received and mustered into the service of the government from any town of such county, is money raised and applied to the use of such county.

If these views are correct, no ground for the interference of this court arises from the fact that the board of supervisors propose to tax the county at large for these bonds issued under their authority. But this action can not be sustained, for other reasons. The plaintiffs have no common interest in the subject in controversy, to entitle them to join in the action. They are freeholders and taxpayers of Groveland. A tax would be a lien upon their respective lands, but not upon any common property owned by them. Parties so situated can not join in a suit in equity. (*Bouton* v. *The City of Brooklyn*, 15 *Barb.* 375.) But the plaintiffs, if otherwise entitled to maintain the action, could have no effectual relief

pay bounties to volunteers or *drafted* men applying on the quota of said town." It is enough to say that the bonds can not rightfully be used, except for the purpose authorized by the statute and the resolutions of the board; but for the accomplishment of that purpose the treasurer must be allowed to issue them in pursuance of the terms of the resolution. The court can not restrain the issuing of the bonds in the mode prescribed by the proper authorities upon a mere apprehension that the public officer who is designated to receive them will misapply their avails.

As the case is thus decided on its merits, it is unnecessary to consider the various questions of practice and pleading that were discussed on the argument.

The injunction is dissolved with ten dollars costs of the motion.

[Ontario Special Term, October 11, 1864.]

in this suit. The action is against the individual supervisors, not against the board of supervisors. When a county is to be sued, the action must be against the board of supervisors and not against the individual members. (10 *Wend.* 383. 19 *id.* 102. 5 *Denio*, 517. 9 *How.* 316.)

The plaintiffs ask a perpetual injunction. Such injunction would only stay the defendants, not their successors in the next board of supervisors, or bind the county. The injunction I think should be dissolved with costs.

[Monroe General Term, December 23, 1864. *J. C. Smith, Willes* and *E. Darwin Smith*, Justices.]

Dillaye *vs.* Wilson and Craft.

In an action against W. and C. to recover the possession of one undivided tenth part of one hundred acres of land, the defendants put in separate answers. C. did not set up, in his answer, that he occupied and was in possession of only a portion of the land; that his occupation and possession were exclusive and in severalty; and that W. was in the exclusive occupation and possession of the remainder. The answer of W. contained the necessary allegations to entitle him to raise the objection that the action could not be maintained against the defendants jointly, and that the plaintiff was bound to elect, at the trial, against which he would proceed. The referee found that the plaintiff had title, in fee, to one undivided tenth part of the one hundred acres of land described in the complaint; but that W. and C. were not in the joint possession or occupancy of any portion of the land; that by a partition between themselves, W. took twenty acres and W. eighty acres thereof, and each entered into the exclusive possession of his share.

Held 1. That C. had, by his answer, waived the objection that the plaintiff could not maintain the action against him and W. jointly, and that the plaintiff was bound to elect, at the trial, against which he would proceed.

2. That the defendants could not demur to the complaint on the ground that several causes of action had been improperly united, for the reason that it did not appear on the face thereof that several causes of action had been so united.

3. That the plaintiff was entitled to recover against C.; and that the referee erred in giving judgment in favor of C.

4. That there was nothing in the case to prevent the plaintiff from electing to proceed against W.; and that he might do so, on a retrial of the action.

Dillaye *v.* Wilson.

The section of the revised statutes which provides that "when the action is against several defendants, if it appear on the trial that any of them occupy distinct parcels in severalty, or jointly, and that other defendants possess other parcels in severalty, or jointly, the plaintiff shall elect, at the trial, against which he will proceed; which election shall be made before the testimony in the cause shall be deemed closed; and a verdict shall thereupon be rendered for the defendants not so proceeded against," was not repealed by the code of procedure; but relates to the subject matter of the action, and is retained in force by section 455 of the code.

APPEAL by the plaintiff from two judgments rendered against him in favor of the defendants, separately and severally, for costs.

The action was brought to recover the possession of one undivided tenth part of 100 acres of land situated in Chenango county. The defendants interposed separate answers by different attorneys. The action was tried before a referee, who reported in favor of the defendants, and upon his report the two judgments appealed from by the plaintiff, were entered in the office of the clerk of Chenango county.

Daniel Pratt, for the plaintiff.

D. K. Bourne, for the defendant Craft.

Lewis Kingsley, for the defendant Wilson.

By the Court, BALCOM, J. The plaintiff proved, and the referee found, that the plaintiff had title in fee to one undivided tenth part of the 100 acres of land described in the complaint, and for which tenth part judgment was demanded in the complaint. But the referee also found that the defendants were not in the joint possession or occupancy of any portion of the land. That they partitioned the same between them prior to the commencement of the action; by which partition the defendant Wilson took twenty acres and entered into the exclusive possession of the same, and the defendant Craft took eighty acres and entered into the exclusive possession of the same. The partition was made by the

defendants executing quitclaim deeds to each other; and the division line was indicated by a fence erected and maintained thereon.

The referee decided that the plaintiff could not recover against both defendants, because they did not jointly possess or jointly occupy any portion of the land when the action was commenced; and that he could not recover against either defendant, for the reason that he did not elect on the trial which he would proceed against.

It is clear that the plaintiff could have maintained an action for one undivided tenth part of 20 acres of the land, against the defendant Wilson separately, and another for a like interest in eighty acres of the land against the defendant Craft separately.

The referee was governed by the section of the revised statutes, which provides that "when the action is against several defendants, if it appear on the trial, that any of them occupy distinct parcels in severalty, or jointly, and that other defendants possess other parcels in severalty, or jointly, the plaintiff shall elect at the trial against which he will proceed; which election shall be made before the testimony in the cause shall be deemed closed; and a verdict shall thereupon be rendered for the defendants not so proceeded against." (2 *R. S.* 307, § 29.)

It is claimed on the part of the plaintiff that the above provision has been repealed by the code, which provides that, "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved." (§ 118.) Again, that "the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others or by saving their rights." (§ 122.) Further, that "If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant, or

defendants, if the action had been against them or any of them alone." (§ 136, *sub.* 3.) Also, that "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side as between themselves; and it may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants, the court may in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper." (§ 274.)

But the provision of the revised statutes which I have quoted relates to the subject matter of the action, and is retained in force by section 455 of the code. That section is as follows: "The general provisions of the revised statutes, relating to actions concerning real property, shall apply to actions brought under this act, according to the subject matter of the action without regard to its form."

If all the facts in the case respecting the occupancy of the land by the defendants in severalty had been truly stated in the complaint, they could have demurred to it on the ground "that several causes of action had been improperly united." (*See Code*, § 144; *Id.* § 167, *sub.* 5, *and last paragraph of that section.*) But when a demurrer is allowed on the above mentioned ground, "the court may, in its discretion, and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned." (*Code*, § 172.)

The defendants could not demur to the complaint on the above mentioned ground, for the reason that it did not appear "upon the face thereof," that several causes of action had been improperly united. (*Code*, § 144.) But by section 147 of the code, "when any of the matters enumerated in section 144 do not appear upon the face of the complaint, the objection may be taken by answer." And it is further pro-

vided by the next section, that "If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except only to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action." (*Code*, § 148.)

The defendant Craft did not set up in his answer that he occupied and was in possession of only eighty acres of the land, and that his occupation and possession were exclusive and in severalty, and that the defendant Wilson was in the exclusive occupation and possession of the remaining twenty acres; and of course the defendant Craft waived the objection that the plaintiff could not maintain the action against him and the defendant Wilson jointly, and that the plaintiff was bound to elect at the trial against which he would proceed. This view of the case is sustained by the decision of the court of appeals in *Fosgate* v. *The Herkimer Manufacturing and Hydraulic Co.*, (2 *Kernan*, 580.)

It follows that the plaintiff was entitled to recover against the defendant Craft, and that the referee erred in giving judgment in favor of such defendant.

But the answer of the defendant Wilson contains the necessary allegations to entitle him to raise the objection that the action could not be maintained against the defendants jointly, and that the plaintiff was bound to elect at the trial against which he would proceed.

There is however nothing in the case to prevent the plaintiff electing to proceed against the defendant Wilson; and he may do so on a re-trial of the action.

My conclusion therefore is, that the judgment in favor of Wilson, as well as the one in favor of his co-defendant, should be reversed, and a new trial granted; costs to abide the event.

Decision accordingly.

[Broome General Term, January 24, 1865. *Parker*, *Mason* and *Balcom*, Justices.]

WYNKOOP and others *vs.* HALBUT.

43 266
63 304
27h 113

The plaintiffs recovered a judgment in a justice's court for $140, damages and costs. The defendant appealed to the county court, stating in his notice of appeal, as required by § 371 of the code of procedure, as amended in 1862, the particulars in which he claimed that the judgment should have been more favorable to him, viz. that it should have been in his favor for no cause of action, and for costs. No offer was made by the respondent, to allow the judgment to be corrected, in any of the particulars mentioned in the notice of appeal. The action was again tried in the county court, and the plaintiffs recovered a verdict for $58. *Held* that the appellant was not entitled to costs on the appeal, but that the respondents were.

THIS suit was commenced in a justice's court, to recover damages for injuries alleged to have been done by the defendant to the plaintiffs' colt, by misfeasance in driving him into the defendant's yard, and by carelessness, &c. It resulted in a judgment for the plaintiffs for $140 damages and costs. The defendant appealed to the county court, where the suit was again tried and resulted in a verdict for the plaintiffs for $58. The following are the specifications in the defendant's notice of appeal:

1st. That the facts proved on the trial do not show a cause of action in favor of the plaintiffs against the defendant.

2d. That there is no liability shown on the part of the defendant to pay for the colt.

3d. The defendant claims that said judgment should have been more favorable to him in this particular, viz. that it should have been in his favor for no cause of action, and for costs.

Upon these facts the clerk of Chemung county refused to tax the costs of the appeal in the plaintiffs' favor, but taxed them, under § 371 of the code, in favor of the defendant. This taxation was set aside by Justice Campbell on a motion made at a special term, and the clerk was ordered to tax the costs of the appeal to the plaintiffs. From that order the defendant brought this appeal.

Smith & Spaulding, for the defendant.

Smith, Robertson & Fassett, for the plaintiffs.

By the Court, MASON, J. This amendment of 1862, of § 371 of the code, has introduced an entirely new practice in regard to appeals from justices' judgments to the county court. It declares that in the notice of appeal the appellant shall state in what particulars he claims the judgment should have been more favorable to him. And that within fifteen days after service of the notice of appeal the respondent may serve upon the appellant and justice an offer, in writing, to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal. Then the section declares that the appellant may file an acceptance of this offer within five days, and that the justice shall then correct the judgment accordingly, &c.

It then declares that if such offer be not made, and the judgment in the county court be made more favorable to the appellant than the judgment in the court below, or if such offer be made and not accepted, and the judgment be more favorable to the appellant than the offer of the respondent, the appellant shall recover costs. The statute further declares that the respondent shall be entitled to recover costs where the appellant is not.

It cannot be denied that, construing this statute according to its strict letter, this appellant is entitled to costs on the appeal; for he certainly had specified in his notice of appeal in what particular he claimed the judgment should have been more favorable to him. No offer was made by the respondent, and the judgment in the county court was made more favorable to the appellant.

The maxim "*Quæ haerit in litera haerit in cortice*" has admonished courts to look beyond the mere letter of a statute, for as it is the duty of courts to execute all laws according to their true meaning, *that intent*, when collected from the

whole and every part of the statute taken together, must prevail even over the literal sense of the terms, and control the strict letter of the law, when the letter would lead to palpable injustice and absurdity. (1 *Kent's Com.* 462. *Smith on Statutes, p.* 662, § 515. 24 *Pick.* 870.) The sound rule on this subject is, that whenever the intention of the makers of a statute can be ascertained it ought to be followed, although such construction seems contrary to the letter of the statute; for the reason that "a thing that is within the letter of a statute, is not within the statute, unless it be also within the intention of the law makers." (15 *John.* 380. 2 *Burr.* 786. 4 *Gill & John.* 6. 3 *B. & A.* 266. 4 *id.* 212. 3 *Conn. Rep.* 85. 2 *Cranch*, 399. *Smith on Statutes*, 820.)

Applying these familiar principles and rules to the construction of this 371st section, there can not, it seems to me, be any doubt but that the judge at special term was right in holding that the appellant was not, but that the respondent was, entitled to costs on the appeal.

This amendment was undoubtedly introduced for the purpose of putting a check to further litigation between the parties after one trial. (*Fox* v. *Nellis*, 25 *How. Pr. Rep.* 144.) And I fully agree with the clear and explicit design and object of this statute as stated in the opinion of Justice Potter in *Fox* v. *Nellis*, (*supra.*) He says: "The parties themselves are supposed best to know whether the trial was fair, and has resulted in a just and equitable judgment; and it allows each, then, to become an actor for the correction of errors at his own peril of future expense in case of future controversy. The prevailing party, after having seen and heard the complaint of the other, is then allowed fifteen days to consider, and within which to determine the future hazards of litigation, and to say whether he will allow the judgment to be corrected in any of the particulars in which his adversary complains; and if so, how much and to what extent his conscience, his judgment and his discretion are all called

into exercise upon the question of his interest. He is not bound, as a matter of course, to make any such offer of corrections; he has a right to hold on, but at his own risk and peril. If, however, he fails to make the offer of corrections; and if, upon a new trial, the appellant obtains a judgment more favorable to himself than the judgment in the court below, the appellant recovers costs of the trial against him, and of course his own costs in such an event are to be borne by himself. This being the penalty, it was doubtless supposed that it would have the effect to keep the successful party from holding on to an unconscientious judgment, or carefully to consider whether, upon a fair or fuller developement of facts, or just trial upon the merits, a judgment might not be obtained, less favorable to him than the first. This seems to be the spirit and intent of this section as applicable to all cases." And he held, further, that the respondent was not required to make an offer which required him to abandon his judgment altogether when he was entitled to it, but for a lesser amount. Now it should be borne in mind that the respondent is restricted in his right to make the offer to allow the judgment to be corrected to the very particulars mentioned, in the notice of appeal. He could not, therefore, in the case at bar, make an offer to reduce this judgment if he had desired to do so. The only offer he could make was to have it reversed and vacated altogether. This the defendant had no right to ask, and the plaintiff was under no obligation to grant it. (25 *How.* 145.) It is simply absurd to hold that the legislature meant to compel a plaintiff to give up his judgment altogether, which he was justly entitled to, simply because the jury had given him a few dollars too much, or else pay a bill of costs on the appeal, in many cases larger than the judgment itself. Such injustice never could have been intended by the framers of the statute. The defendant had a right to put the respondent in the position that would have compelled him to assume the responsibility of making an offer to

reduce the judgment to an amount which was just, and which he could sustain in the appellate court; and I agree with Justice Potter in *Fox* v. *Nellis*, that where the defendant in his notice of appeal states that the verdict or judgment is for too large an amount, the respondent has the responsibility cast upon him of offering to reduce it or be subject to costs; and he must say how much, and fix a sum he can sustain on the appeal. As there was no notice of the kind in this case, the plaintiffs could not, if they would, serve an offer to reduce it; and when they could not do so, no law should punish them for not doing it. The order appealed from should be affirmed, with $10 costs.

[Broome General Term, January 24, 1865. *Campbell*, *Balcom*, *Parker* and *Mason*, Justices.]

Livingston *vs.* Painter, adm'x, &c., and Boyes.

H. being the holder of a first mortgage made by L. to secure $12,000, the principal sum of which was then due and payable, at the option of H., in consequence of a default having been made in the payment of interest; and P. being the owner of a second mortgage on the same premises, made by L., which he was then foreclosing; P., in order to prevent the threatened foreclosure of the first mortgage, made an agreement with H., whereby, in consideration of H.'s waiving his option to consider the principal of the first mortgage due, he agreed, 1. To pay the interest, taxes and assessments in arrear; 2. To prosecute the foreclosure of the second mortgage; and 3. In the event of his buying the mortgaged premises, "in his own name or otherwise," at the foreclosure sale, subject to the first mortgage, to reduce the principal sum secured by the said first mortgage by paying $3000, on account thereof. At the foreclosure sale B. purchased the mortgaged premises, and took the sheriff's deed in his own name, at the instance and for the benefit of P., and with full knowledge of the agreement made by P., and for the purpose of enabling P. to evade the same.

Held, 1. That the agreement made by P. was a lawful and valid agreement, for a sufficient and lawful consideration.

2. That the complaint showed a prima facie right in H. to come into a court of equity at least for the purpose of obtaining a decree declaring the

sheriff's deed to B. to be fraudulent, inoperative and void, so far as it prevented the specific performance of the agreement of P. to reduce the first mortgage.

3. That a court of equity having jurisdiction for that purpose, it could proceed and decree a specific performance of the agreement of P. to reduce the first mortgage by paying $3000 on account thereof. CLERKE, J. dissented.

APPEAL from a judgment of the special term dismissing the plaintiff's complaint. The action was brought to compel the specific performance of an agreement entered into between Hamilton, the assignor of the plaintiff, and the defendant's intestate. The agreement recited that Painter was the owner of a second mortgage for $12,340 on certain leasehold premises, which he was foreclosing; that Hamilton was the owner of a first mortgage for $12,000 on the same premises, which had become due at Hamilton's option, in consequence of a default in the payment of interest; and that Hamilton had agreed to waive this option. In consideration of this waiver Painter agreed, first, to pay the interest in arrear; second, to prosecute the foreclosure of the second mortgage to the earliest conclusion; and third, in the event of his buying the leasehold premises "in his own name or otherwise," at the foreclosure sale, to reduce the principal sum secured by the first mortgage by paying $3000 on account thereof. The complaint, after stating the agreement, alleged that Painter obtained a judgment for the foreclosure of the second mortgage, under which the premises were sold and bought in the name of the defendant Boyes, who obtained the sheriff's deed; that Painter bought the premises in the name of Boyes, for the purpose of evading the terms of his agreement; that Boyes paid no consideration therefor, and acted under the direction of Painter, for whom he was a mere agent or trustee, with a full knowledge of the above agreement; that Painter had failed to reduce the first mortgage by paying $3000 on account of the same, and that the bond, mortgage and agreement had been assigned to the

plaintiff. The relief prayed for was, first, that the sheriff's deed to Boyes be declared void, so far as it prevented the specific performance of the agreement; second, that Painter reduce the first mortgage, by paying $3000 on account thereof; and third, for general relief. On the trial, the court dismissed the complaint upon the pleadings and the plaintiff's opening, upon the ground that it did not present a case for equitable interposition. The opinion of the court is reported in 24 *How. Pr. R.* 231, and 15 *Abb. Pr. R.* 360.

Lewis L. Delafield, for the appellant.

R. M. Harrington, for the respondents.

SUTHERLAND, J. The agreement of Painter, the holder of the second mortgage, if he bought "in his own name or otherwise," at the sale under the foreclosure of his mortgage, that then he should and would reduce the principal sum secured by the first mortgage, (held by Hamilton as executor, &c.,) by paying on account of the same $3000, was a lawful and valid agreement, for a sufficient and lawful consideration; the consideration being the agreement of Hamilton to waive his option of considering the whole principal of his mortgage due and payable for non-payment of interest; and Painter avers in his answer, that Hamilton in fact waived his option to consider the whole principal due, by actually, soon after the making of the agreement, receiving from him the interest. It is easy to see that this waiver of Hamilton, of his right to foreclose his mortgage for the whole principal and interest, might be, and probably was, very beneficial to the holder of the second mortgage. The complaint alleges, in substance, that on the sale under the foreclosure of Painter's mortgage, the defendant Boyes purchased the mortgaged premises or interest, and took the sheriff's deed in his name, at the instance and for the benefit of Painter, and with full knowledge of the agreement between Hamilton

and Painter, for the purpose of enabling Painter to evade the agreement; and that Boyes paid no money, but gave a mortgage to Painter for the whole amount of the purchase money. The specific relief asked by the complaint is, 1st, that the sheriff's deed to Boyes be declared fraudulent, inoperative and void, so far as it prevents the specific performance of the agreement by Painter to reduce the principal of the first mortgage by paying the $3000 on account thereof; 2d, that the defendant Painter be adjudged to reduce the principal of the mortgage by paying the $3000 on account thereof. The complaint also asks for general relief.

It is plain, I think, that the complaint shows a prima facie right in the plaintiff (Hamilton's assignee) to come into a court of equity at least for the purpose of obtaining the relief first specifically asked for; and if so, it is perfectly clear that a court of equity having jurisdiction for such purpose could proceed and give the relief secondly specifically asked for, though the plaintiff might have obtained such last mentioned relief in a court of law. But I do not see how the plaintiff could have obtained this relief in a court of law. The relief is, that Painter be decreed to reduce the principal of the mortgage, according to his agreement, by paying $3000 on account of the principal. Certainly a court of law could not grant this relief. The plaintiff asks for a specific performance of his agreement, and I think the pleadings show, prima facie, that he has a right to it.

I do not see how the plaintiff could recover any thing beyond nominal damages, at law, without showing that his mortgage had been foreclosed for the whole principal, and that the mortgaged premises or interests did not bring sufficient to pay the mortgage.

It appears to me that the plaintiff's complaint was inadvertently dismissed as it was, on his opening and the pleadings, and that the judgment should be reversed, and a new trial ordered, with costs to abide the event of the action.

INGRAHAM, J. Even if the prayer in the complaint was merely for a sum of money, the facts set out therein show a good cause of action in equity, on which the plaintiff was entitled to relief. If so, and the court had jurisdiction, it could give such relief as the party was entitled to, including a judgment for money, if proper. I concur in reversing the judgment.

CLERKE, J. dissented.

New trial granted.

[NEW YORK GENERAL TERM, February 6, 1865. *Ingraham, Clerke* and *Sutherland*, Justices.]

SWIFT and others *vs.* OPDYKE and others.

43 274
27h 420
42h 578

Where a contract is made, for the sale and delivery of two different parcels of goods, to arrive in different ships, at different periods of time, each portion of the contract is complete in itself, without reference to the other.

Though the parties may, by express terms, make such a contract not only one and the same but also indivisible, yet if nothing of the kind appears, showing that the time of payment is to be deferred until the delivery of all the goods, it will not be assumed that the two distinct parts of the contract were intended to be dependent on each other. The implication must be plain and unmistakable, to justify such a conclusion.

Whether such a transaction be deemed one and the same contract, and yet divisible, or whether it be deemed two distinct and separate contracts, the delivery of a portion of the goods will take the claim for the value of that portion out of the statute of frauds.

In the one case, it will amount to a part performance, and in the other to an entire performance of one of the contracts, the acceptance of a portion of the goods being a waiver of the right to the whole.

THIS was an action for the price of goods sold, amounting in value to $3465.75.

There were two causes of action alleged in the complaint. First, For the price of seven bales of eight-pound blankets

and of one bale of seven-pound blankets. Second. For the price of five bales of seven-pound blankets. On the second cause of action, the plaintiffs recovered. On the first, the jury, under the instruction of the court, rendered a verdict against them so far as the eight-pound blankets were concerned. On a case and exceptions, they moved, at special term, for a new trial, which was denied, *pro forma*, and the present appeal was from that denial. The only question here was, as to the right to recover for the eight-pound bales. The actual delivery of these bales was undisputed, and there was no dispute about their quality or value; but the defense was that they formed part of an entire quantity of twenty-two bales in all, alleged to have been contracted for by the defendants in August, 1861; that the whole quantity so contracted for had not been delivered, and that therefore the seven bales delivered were practically forfeited to the defendants. The proof showed that in August, 1861, the plaintiffs were expecting the arrival in New York from England of two parcels of eight-pound blankets—one shipment to embrace eight bales, and the other to embrace fourteen bales. The eight bales were to come by the Yorkshire, which sailed July 15, 1861; the remaining fourteen were to come by the packet that followed the Yorkshire. The plaintiffs offered these two shipments for sale to the defendants, and the parties had several conversations about them, which ended on August 23d, by the defendant Opdyke saying to one of the plaintiffs, "we will take the eight-pound blankets." The defendants had, in the meantime, sold the fourteen bales embraced in the second shipment. It was a question on the trial whether the plaintiffs had not notified the defendants of this sale. The plaintiffs contended that they had done so; the defendants contended the contrary. On August 28th, five days after the oral negotiation was concluded, as above stated, the Yorkshire arrived. Only seven bales equal to the sample arrived in her, and these seven were delivered directly from her to the de-

fendants at their store. These are the bales the price of which is sued for. An eighth bale arrived, but it was not delivered nor accepted, because it turned out to be of an inferior quality. There was no evidence that the sale or delivery was made upon credit. The bill for the seven bales delivered was sent to the defendants August 31. A demand for payment for those goods was subsequently made, and before the arrival of the second shipment the defendants asked for a bill for what had already been delivered. The defendants contended that the oral contract was for the sale and delivery of the whole twenty-two bales, and that the delivery and acceptance of the seven bales sued for made that contract binding and valid within the statute of frauds. The court submitted the question to the jury whether the defendants had a right to understand that the (oral) contract embraced the twenty-two bales, and whether the goods were delivered in pursuance of that understanding, and instructed them that in that case the plaintiffs could not ask pay for the goods delivered until they should have delivered the remainder, and that the (oral) contract being for a larger quantity than they delivered, the plaintiffs must perform their part of the agreement before they can exact such performance on the part of the defendants. To this instruction the plaintiffs excepted. The court also, without any instruction to the jury as to what acts would constitute a waiver, charged them that if the (oral) contract was for only eight bales, and there was a delivery of only seven, with a waiver of the eighth, the plaintiffs were entitled to recover for the seven, but if there was no such waiver, the plaintiffs were not entitled to recover at all; to the latter part of which instruction the plaintiffs excepted, and the court, under the plaintiffs' exception, declined to charge that certain conversations between the parties, which had been given in evidence, constituted, if truly stated, a waiver of the delivery of one bale out of the first shipment.

F. N. Bangs, for the appellants.

David Dudley Field, for the respondents.

By the Court, CLERKE, J. I think the judge erred in telling the jury "that if they came to the conclusion that if the contract was to deliver twenty-two bales of these goods, then the plaintiffs were not entitled to recover for the seven bales of the eight-pound goods that were delivered." Even supposing the contract to be one and the same, it was for the sale and delivery of two different parcels, to come in different ships, at different periods of time. Each portion of the contract, therefore, was complete in itself without reference to the other. Undoubtedly, the parties could, by express terms, make this contract not only one and the same, but also indivisible. But nothing of this kind appears: nothing was even said showing that the time of payment was to be deferred until the delivery of the twenty-two bales. We have no more reason in this case than the court had in *Tipton* v. *Feitner*, (20 *N. Y. Rep.* 423,) to assume that the two distinct parts of the contract were intended to be dependent on each other; and, as was said in that case, "the implication must be plain and unmistakable, to justify such a conclusion, as its effect would be to impose upon the plaintiff a heavy penalty or forfeiture."

The redress to the defendant for the failure of the plaintiff in not completing the contract, would be by a separate action for damages, or by a counter-claim in this action.

Whether this transaction may be deemed one and the same contract and yet divisible, or whether it may be deemed two separate and distinct contracts, the delivery of the seven bales took the claim for the value of these bales out of the statute of frauds. In the one case it amounted to a part performance: the purchaser having complied with the statute in accepting part of the goods. It is not necessary, at least it is not provided in the statute, that the acceptance shall be

simultaneous with the contract. If this transaction may be deemed to consist of two distinct contracts, the delivery of the seven bales amounted to an entire performance of one of the contracts; the acceptance of these bales being a waiver of the right to eight. The order should be reversed, and a new trial ordered, with costs to abide the event.

[New York General Term, Febuary 6, 1865. *Ingraham, Clerke* and *Sutherland,* Justices.]

THE PEOPLE, *ex rel.* The New York Consolidated Stage Company *vs.* THE COURT OF COMMON PLEAS for the city and county of New York.

The awarding of a writ of prohibition is discretionary. A judge of the supreme court may refuse to grant the writ, at chambers, or, which is the same thing, may revoke a writ which he has inadvertently issued.

The writ is granted by the superior courts of Westminster, and in New York by the supreme court alone, to prevent inferior courts from exceeding their jurisdiction.

Although the supreme court, in the exercise of its supreme superintending power over all other courts of original jurisdiction in the state, will issue the writ where visitorial or any other authority is usurped, it will refuse it where the general scope or purpose of the action is within the jurisdiction of the inferior court; an overstepping of its authority, in a portion of its judgment, or any other error in its proceedings, being a ground of appeal or review, but not of prohibition.

The court of common pleas for the city and county of New York, being intrusted with equity powers in cases of fraud, as ample as those of the supreme court, has jurisdiction of an action to set aside, as fraudulent, an assignment made for the benefit of creditors, and to enjoin the assignee from holding possession of, or interfering with, the assigned property.

To grant a writ of prohibition, in such an action, would be an attempt to deprive the common pleas of a jurisdiction which the law, in its wisdom, has thought proper to give it. *Per* CLERKE, J.

APPEAL from an order made at chambers, setting aside a writ of prohibition. The writ was granted by the court, on motion, made *ex parte,* to restrain the court of common

pleas, the judges thereof, and Hugh Smith and John Kerr from proceeding in an action, brought by Smith and Kerr in that court, to set aside an assignment of the property &c. of the New York Consolidated Stage Company to Augustus Schell for the payment of debts, and for a receiver of the property &c. of the said company, being an incorporated company doing business in the city of New York. A motion had been made for a receiver, and granted, but the order had not been entered. The complaint was made a part of the moving papers, upon which the motion to set aside the writ of prohibition was made and granted. The property assigned was "all the horses, mares, stages, sleighs, vehicles, harness, stables, licenses, goods, chattels, credits and effects belonging to the party of the first part, including the lease of the premises on Thirty-ninth street and Broadway, upon which their stables are erected, and all the property and estate real, personal and mixed, of every description and wheresoever situated." The order granted was for the relators to show cause why "a receiver should not be appointed by the court to take charge of the property and effects" of the New York Consolidated Stage Company, and "to preserve the same and all moneys arising from the prosecution of the business of the said company." The judge granted the motion for a receiver upon the ground that the assignment was void as *ultra vires*, and also on the ground that the company *was insolvent*, and the assignment made in *contemplation of insolvency*. The proposed order appoints "a receiver to take charge of all the property and effects of the said defendants, The New York Consolidated Stage Company, of every kind and description whatever." The writ was granted on the 17th of December, 1864, and was served on the parties immediately thereafter. On the 20th of December, on affidavit by Mr. Lawrence, an order was granted requiring the relators to show cause why the writ should not be set aside, upon several grounds stated in the order. On the 7th of

January, 1865, the writ was set aside. No reason was assigned for the order.

C. A. Rapallo and *Wm. F. Allen*, for the appellants.

A. R. Lawrence, Jun. and *H. W. Robinson*, for the respondents.

By the Court, CLERKE, J. The weight of authority is certainly in favor of the proposition that a refusal to grant a writ of prohibition is not appealable. It seems to have been held by the greater number of judges in England, that the awarding of a prohibition is discretionary; that is, in the language of Mathew Bacon, "from the circumstances of the case the superior courts are at liberty to exercise a legal discretion, but not an arbitrary one, in refusing prohibitions, where in such like cases they have been granted, or where by the laws and statutes of the realm they ought to be granted." (*Bac. Abr. title Prohibition B; see also Ex parte Braudlacht*, 2 *Hill*, 367.)

The determination of this question is, however, not necessary to the present case, for the justice from whose order this appeal is taken, was abundantly justified in refusing to grant a writ of prohibition, or what is the same thing, in revoking a writ which he had inadvertently issued.

This writ is granted by the superior courts of Westminster, and in this state by the supreme court alone, to prevent inferior courts from exceeding their jurisdiction. It appears to me very plain that the court of common pleas, in *entertaining* jurisdiction of the action entitled *Hugh Smith and John Kerr* v. *The New York Consolidated Stage Company and others*, did not exceed its jurisdiction. In doing so, that court does not necessarily exercise the visitorial power intrusted alone to the supreme court. The main object of the action was to have an alleged fraudulent assignment, executed by a majority of the directors, declared null and void,

and to enjoin the assignee from holding possession of, or interfering with, the property and effects of the company. This is the exercise of the ordinary equity powers in cases of fraud, with which the court of common pleas is as amply intrusted as the supreme court. To grant a writ of prohibition, therefore, in that action, would be an attempt to deprive the common pleas of a jurisdiction which the law in its wisdom has thought proper to give it; whereas this court is only allowed to issue the writ to prevent the usurpation of a jurisdiction. If in the exercise of its lawful authority, or if, having taken rightful cognizance of an action, the common pleas should not only declare the assignment null and void and enjoin the assignee from taking possession of the property of the company, it should go further, and assume additional powers which it does not possess, or commit any other error, the remedy is not for the injured parties to apply to this court for a writ of prohibition, but to have recourse to the appropriate appellate jurisdiction for a correction of such errors. In short, although this court, in the exercise of its supreme superintending power over all other courts of original jurisdiction in the state, will unhesitatingly issue a writ of prohibition, where visitorial or any other authority is usurped; it will refuse the writ where the general scope or purpose of the action is within the jurisdiction of the inferior court; an overstepping of its authority in a portion of its judgment, or any other error in its proceedings, being a ground of appeal or review, but not of prohibition. See *Grant* v. *Gould*, (2 *H. Black.* 100,) for various reasons a most interesting case.

The order should be affirmed, with $10 costs.

[New York General Term, February 6, 1865. *Ingraham, Sutherland* and *Clerke*, Justices.]

43 282
8h 391

MOODY *vs.* THE MAYOR &c. OF THE CITY OF NEW YORK.

The owners of a pier are liable for injuries sustained by an individual by reason of its defective construction and dangerous condition, notwithstanding the premises are, at the time, in the possession of a tenant who has covenanted to keep the pier in repair, if the defects existed when the owners leased the property to him.

ON the 24th of March, 1861, the plaintiff's vessel was caught upon the northerly end of the pier at the foot of west Thirtieth street, New York, by an obstruction under water, and she thereby became a total loss. The complaint alleged, that her loss was "in consequence of the defective construction and dangerous condition of the said pier," and that the defendants, "well knowing the same, neglected to properly construct and keep the said pier in repair." The evidence presents the following facts: That the plaintiff was the owner of the vessel; her loss and value; that her loss was caused "by logs of timber, constituting part of the pier, projecting five or six feet from the north side thereof, near the end of it, and which logs were beneath the surface of the water, only to be seen at low water mark." George White, a witness for the plaintiff, shows that he was superintendent of wharves during 1861, and that "a block was sunk and let out five or six feet at the north side of the pier at the foot of Thirtieth street, and it was up at low-water mark, and was a permanent obstruction;" that the same was known to the common council, to the street department, and the comptroller. The defendants admitted that the wharf in question was constructed by the city. Harvey P. Farrington testified that he had a lease of the pier in question of the corporation, on the 1st of May, 1861. He says, "An allowance was made to me, on account of the obstruction, of $400 a year, to be deducted from the rent." In May he made complaint to the comptroller that the wharf was not in a condition for vessels to be at the northerly end for a certain distance, somewhere about one hundred feet; and was told to, and he

did, make a complaint to the street commissioner. The comptroller allowed him $400 a year until the pier should be fixed, and it was not fixed.

The defendants having rested their case, moved that the complaint be dismissed, upon the following grounds, namely: 1. That the slips, wharves and piers in the city of New York are not highways or public streets, and the defendants are not bound to keep them in repair, and are not liable for damages occasioned by an obstruction beneath the surface of the water in the slip. 2. That the pier having been shown to have been leased by the defendants to Farrington, and in his absolute possession at the time of the accident, the corporation are not liable. 3. That the lessee (Farrington) having covenanted with the corporation, in the lease, to make all necessary repairs during the term of the lease, the corporation is not liable. 4. That the tenant is bound to repair, in the absence of any agreement upon the part of the owner to that effect; and the corporation is therefore not liable for an injury resulting to the plaintiff from a want of repair. The court denied the motion, and the defendants' counsel excepted. The jury found a verdict for the plaintiff of $500, and thereupon, at the request of the defendants, twenty days were given to prepare a case, and the exceptions to be heard, in the first instance, at the general term.

Wm. Jay Haskett, for the plaintiff. I. The motion for a nonsuit was properly denied. (1.) Because the defendants defectively constructed the pier, and knowingly allowed it to remain in a dangerous condition, and a permanent obstruction, amounting to a nuisance. (2.) Because Farrington's lease could not exonerate the defendants, because the injury to the plaintiff arose from the *defective construction* and *dangerous condition of the pier*, and not from any want of repairs, arising out of its use. (3.) Because the defendants only leased to Farrington the right to collect wharfage. The lease did not convey the pier to him; and if he failed to

repair it, then this duty was assumed by, and imposed on the defendant by the terms of the lease. This point is clearly settled in *Taylor* v. *The Mayor &c.* (4 *E. D. Smith*, 559.)

II. A navigable river is a public highway, and an action lies for obstructing it to the injury of others. (*Shaw* v. *Crawford*, 10 *John.* 236.) Whoever obstructs a highway, or renders its use hazardous, is liable to any one who, without fault of his own, sustains a special injury therefrom. (23 *Wend.* 446. *Congreve* v. *Smith*, 18 *N. Y. Rep.* 79, *affirming S. C.*, 5 *Duer*, 495.) The corporation was bound *to indicate* to the wayfarer *the danger*, in a manner not to be mistaken. (*Ireland* v. *Oswego Plank Road*, 13 *N. Y. Rep.* 526.) "The owner of a vessel sunk in a navigable river is bound to place a buoy over the wreck, to point out the danger." Lord Ellenborough said: "It is a peremptory law of navigation, that when *any substance is sunk in a navigable river*, so as to create danger, a buoy shall be placed over it for the safety of the public. It is of the utmost importance to the property and lives of his majesty's subjects, that such a warning shall be given as will necessarily inform every one engaged in the navigation of the river of the existence of the danger." (*Hammond* v. *Pearson*, 1 *Campb. Nisi Prius*, 515.)

John E. Develin, for the defendants, cited *Cheetham* v. *Hampson*, (4 *Term R.* 318;) *Mayor &c. of New York* v. *Corlies*, (2 *Sandf.* 301;) *Howard* v. *Doolittle*, (3 *Duer*, 464;) *Sherwood* v. *Seaman*, (2 *Bosw.* 127.)

By the Court, CLERKE, J. None of the cases cited by the counsel for the defendant are available for him. On the contrary, *Cheetham* v. *Hampson* (4 *Term R.* 318) is against him. A case (*Rosewell* v. *Prior*, *Salk.* 460) was cited by counsel, to show that an action was maintained against the owner of premises, who was not in possession, for a nuisance, in making an erection which stopped ancient lights. Bul-

ler, J., in delivering his opinion in *Cheetham* v. *Hampson*, refers to *Rosewell* v. *Prior*, and remarks that it was very distinguishable from the case then under consideration. "For there," he says, "the owner let the premises with the nuisance complained of, which had been before erected upon them." The injury to the plaintiff in the present case arose not from any want of repairs arising out of the use, but from the defective construction and dangerous condition of the pier. The defendants, the owners, let the pier "with the defect complained of," and are consequently liable for the injury sustained by the plaintiff.

There should be judgment for the plaintiff on the verdict, with costs.

[New York General Term, February 6, 1865. *Ingraham, Clerke* and *Sutherland*, Justices.]

Gibson and others *vs.* Stone and others.

On the 29th of December, 1860, S. & Co., merchants at Manchester, wrote to G., H. & Co. of the same place, stating that they had instructed their New York house to hold the proceeds of the sales of certain goods for account of G., H. & Co., as security for the payment of their acceptances of B. & Co.'s two drafts for £5000 each, drawn as an advance against the above mentioned shipments. On the 11th of January, 1861, G., H. & Co. wrote to S. & Co. of New York, stating that they hand the latter the two acceptances for £5000 each, as advances on the goods, and which, according to an arrangement with the house of S. & Co. in Manchester, were to be held in trust for the payment of the said two acceptances. On the 29th of January, 1861, S. & Co. of New York wrote to G., H. & Co. acknowledging the receipt of their letter of the 11th which, they say, advises them of the acceptances, and indicates the goods to be held in trust for the payment of the acceptances; adding "all of which is in order."

Held, that these letters did not create any specific lien upon, or equitable assignment of, the goods mentioned therein, in favor of G., H. & Co., but amounted simply to a promise on the part of S. & Co. to hold the proceeds of the goods for their benefit.

And that if S. & Co. instead of selling the goods for cash and remitting the proceeds to G., H. & Co. appropriated them to the payment of their own debts, the latter had no right to follow them into the possession of the creditors; it being merely a violation of a promise, for which S. & Co. were personally responsible.

B., L. & L. by an instrument dated July 1, 1860, reciting that they composed the firm of S. & Co., agreed that, as H. A. S. had loaned them $100,000, to be used as capital for the term of two years and subject to all the risks of their business, so far as the creditors of the firm were concerned, they would pay him interest at the rate of seven per cent, and that as a bonus for the good will of the business (in which he had formerly been a partner) they would allow him, half yearly, one per cent upon the gross sales of the firm, "he having no interest in the commission guarantee, or profit and loss, and in nowise a partner or to be allowed to have any part or control in the business of the house." *Held*, that H. A. S. was not a partner with S. & Co., nor liable as such to creditors of the firm.

APPEAL by the plaintiffs from a judgment entered upon the report of a referee. The plaintiffs recovered judgment against the defendants Andrew S. Stone, Samuel Bates, Charles A. Lord and Edwin Lord, for the sum of $56,337.04, but failed to recover against the other defendants. The principal questions arising in this action are between the plaintiffs composing the firm of Gibson, Hankey & Co., and the defendants composing the firm of Stone & Co. and their creditors. There was no dispute as to the facts. In December, 1860, the defendants Stone & Co. of Manchester were possessed of certain goods, of the value of £11,013 1*s.* 3*d.* sterling which they represented as having been consigned to them by the defendants James Black & Co., and they applied to the plaintiffs for a loan and advance thereon of £10,000 sterling, for the use of Black & Co., and the plaintiffs made the advances upon the goods particularly named, in consideration of, and upon the expressed condition, that the firm of Stone & Co., New York, should hold the same in trust for the payment of those advances. The advances were made by two drafts for £5000 each, drawn by James Black & Co. upon the plaintiffs, which they accepted and paid.

In the course of the above mentioned negotiations, the following correspondence took place between the parties:

FIRST LETTER.

"*Manchester, Dec. 29th*, 1860.

Messrs. GIBSON, HANKEY & Co., Manchester,

Dear Sirs: We have instructed our New York house to hold the proceeds of sales of goods as per memorandum at foot, 'in trust,' for your account, as security for the payment of your two acceptances of Messrs. James Black & Co.'s drafts for £5000 each, drawn as advance against the above mentioned shipments. Yours, very truly,

STONE & Co.

The drafts mentioned above will be protected by remittances from New York."

Annexed to this letter was a list of goods, with marks and numbers.

SECOND LETTER.

"*Manchester, January* 11, 1861.

Messrs. STONE & Co., New York,

Dear Sirs: We have the pleasure to hand you memo. of two acceptances for £5000 each, granted to Messrs. James Black & Co. for your account, as advances on the goods enumerated on the other side, which, according to an arrangement made with your house here, are to be held in trust for the payment of the said two acceptances.

We are, dear sirs, faithfully yours,

GIBSON, HANKEY & Co."

The goods were enumerated upon the back of the letter.

THIRD LETTER.

"*New York, Jan.* 29, 1861.

Messrs. GIBSON, HANKEY & Co., Manchester,

Dear Sirs: We have your esteemed favor of the 11th, advising us of your acceptance, for £10,000, of Messrs. James Black & Co.'s drafts, and indicating the goods to be held in

trust for the payment of said acceptances, all of which is in order. Yours, very truly,

STONE & Co."

Afterwards the firm of Stone & Co., being indebted to sundry persons, hypothecated with the firm of Haggerty & Co. the goods in question, with other merchandise, upon which Haggerty & Co. made large advances; and there remains in the hands of Haggerty & Co., after paying their advances, so much of said trust goods and the proceeds thereof as amounted to $21,126.33. This sum the plaintiffs claim of the defendants Haggerty & Co. On the 24th of July, 1861, the firm of Stone & Co. executed an assignment to certain creditors, in which they assigned to them "the surplus of goods and securities in the hands of Haggerty & Co.," to be paid and distributed among said creditors ratably, among which is Henry A. Stone. The only consideration of this assignment was the indebtedness of Stone & Co. to those creditors. On the 16th of September, 1861, Stone & Co. executed another assignment to the defendants composing the firm of Babcock Bros. and the defendant Henry A. Stone, in and by which they transferred all the goods and merchandise deposited with Haggerty & Co. since July 24, 1861, subject however to the payment of the advances made by them, which those creditors were to hold as collateral security on account of the indebtedness of Stone & Co. to them. The creditors named in those assignments were made parties defendant in this action. This action was commenced on the 4th of October, 1861, and on the 22d of October following two judgments were recovered in the superior court against Stone & Co., in favor of Baring Bros. and Biolly Fils, upon which executions were issued. On the 22d of December, 1861, the sheriff of the city and county of New York, under the executions just mentioned and another, sold all the right, title and interest of the defendants Stone & Co. in the goods so hypothecated with the defendants Haggerty & Co.

to the defendant Samuel G. Ward. The judgment recovered by the plaintiffs against the defendants Andrew S. Stone, Samuel Bates and Charles A. Lord, was for the advances made by the plaintiffs to Stone & Co. on the goods held in trust, and the plaintiff sought to include in that judgment the defendant Henry A. Stone as a partner of the firm of Stone & Co. The referee found that on the 1st of January, 1849, Henry A. Stone was a member of the firm of Stone & Co. and continued to be such until the 1st of July, 1855, when a certain agreement was entered into between him and the firm of Stone & Co., which contained this clause: "We, Samuel Bates, Charles A. Lord and James M. Stone, composing the firm of Stone & Co., New York, agree with Henry A. Stone, that as he has loaned us one hundred thousand dollars to be used as capital for the term of four years, and subject to all the risks of our business as far as the creditors of our firm are concerned, we will pay him interest half yearly at the rate of 7 p. c. per an.; and as a bonus for the good will of the business we will credit him half yearly with 1 p. c. on the amount of the gross sales, he having no interest in the commission, guarantees or profit and loss, and in nowise a partner or to be allowed to have any part or control in the business of the house. We further agree that Henry A. Stone may cancel this agreement at any time after giving six months' notice to us, and to the correspondents of the firm, and he shall be entitled to withdraw at same time in good bills receivable the amount standing to his credit, after reserving fully enough to pay all the creditors of the firm." On the 1st of July, 1860, the defendant Henry A. Stone entered into a similar agreement with the defendants Samuel Bates, Charles A. Lord and Edwin Lord, composing the firm of Stone & Co., of similar import to that of July, 1855. In this firm the defendant Andrew S. Stone had no interest in the profit and loss, and was paid $500 for the use of his name. In the agreement of July, 1855, Henry A. Stone sells the good will of the business of the firm of Stone & Co.,

and in the agreement of July 1, 1860, also professes to dispose of it. The $100,000 alleged to have been loaned to the firm of Stone & Co. by Henry A. Stone, in his agreement of July 1, 1860, was merely a continuation of what he loaned the firm of Stone & Co. in July, 1855, which was then composed of different members. The first agreement was made with Samuel Bates, James M. Stone and Charles A. Lord, and the latter with Samuel Bates, Charles A. Lord and Edwin Lord, and of which firm the defendant Andrew S. Stone was a member. The referee held that the letters between the parties were not a pledge nor a mortgage of said goods, nor did they constitute an equitable assignment thereof affecting the defendants. He also held that the defendant Henry A. Stone was not at any time a member of, nor a partner, nor liable as a partner, in the firm of "Stone & Co." mentioned in the complaint, and directed judgment that the attachment issued in this action be vacated and set aside as to him.

C. Bainbridge Smith, for the appellants.

Aug. F. Smith, for the respondents.

By the Court, CLERKE, J. I concur with the referee in the opinion that the three letters, of December 29, 1860, January 11, and January 29, 1861, did not create any specific lien upon the goods mentioned in these letters. The first letter states that the New York house should hold the proceeds of the sales of certain goods for the plaintiffs' account, as security for the payment of their acceptances of Messrs. James Black & Co.'s two drafts for £5000 each, drawn as an advance against the above mentioned shipments. The second letter of January 11, 1861, written by the plaintiffs to Messrs. Stone & Co. of New York, stating that they hand the latter the two acceptances for £5000 each, as advances on the goods, and which, according to an arrangement with the house of

Stone & Co. in Manchester, were to be held in trust for the payment of the said two acceptances. The third letter, dated 29th January, 1861, written by Stone & Co. of New York to the plaintiffs, acknowledges the receipt of the letter of the 11th, which they say advises them of the acceptances, and indicates the goods to be held in trust for the payment of the acceptances.

Taking these letters together, they simply amount to a promise on the part of Stone & Co. to hold the proceeds of the goods for the benefit of the plaintiffs. It gives them no specific lien on the goods themselves; and if Stone & Co., instead of selling the goods for cash, and remitting the proceeds to the plaintiffs, appropriated them to the payment of their debts, the plaintiffs have no more right to follow them into the possession of the creditors than they would have to follow the proceeds, in case Stone & Co. sold the goods for cash, and appropriated the money to the payment of the same debts. In either case it is alike merely a violation of a promise, for which they are personally responsible to the plaintiffs.

No intent is shown on the part of Stone & Co. to surrender all control over the goods; and this, according to all the authorities, is necessary, in order to constitute an equitable assignment. All that Stone & Co. have said in the letters of 29th December, 1860, and of 29th January, 1861, amounts, I repeat, only to a promise to hold the goods in trust for the benefit of the plaintiffs, and to pay the proceeds to them, giving to the plaintiffs no equitable assignment, and still more clearly, no pledge or mortgage. Stone & Co. retained, throughout, complete control over the goods.

I also am decidedly of opinion that the referee correctly found that Henry A. Stone was not a partner with Stone & Co. As a creditor, for the loan of $100,000, he received 7 per cent; as a previous member of the firm, having disposed of his share of the good will of the establishment, the new firm agreed to allow him, half yearly, one per cent upon the

gross sales of the firm, precisely as they might have allowed any agent for procuring customers a similar per centage. In this agreement, they expressly declare that Henry A. Stone has no interest in the commission guaranties, or profit and loss, and that he is in nowise a partner, or to be allowed to have any part or control in the business of the house.

The judgment should be affirmed, with costs.

[New York General Term, Febuary 6, 1865. *Ingraham, Clerke* and *Sutherland,* Justices.]

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43 292
47 423
51a 47

JAMES HOOPER *vs.* DANIEL HOOPER and ELLEN his wife.

When husband and wife are parties defendant in an action for a personal tort committed by the wife alone, she is competent to give evidence as a witness, in her own behalf.

A married woman, made a party to an action in connection with her husband, is within the spirit and reason as well as within the letter of section 399 of the code of procedure, as amended in 1857, which declares that "a party to an action or proceeding may be examined as a witness in his own behalf, the same as any other witness," &c.

The decision in *Marsh* v. *Potter* (30 *Barb.* 506) approved.

CASE heard upon exceptions taken at the trial and ordered to be heard, in the first instance, at the general term.

Bernard Hughes, for the plaintiff.

J. W. Gilbert, for the defendants.

By the Court, BROWN, J. This is an action tried before Mr. Justice LOTT, for an assault and battery committed by the defendant Ellen Hooper upon the plaintiff. In the progress of the trial the defendants offered Ellen, the defendant, as a witness in her own behalf. She was objected to as incompetent, by the counsel for the plaintiff. The court

sustained the objection and excluded the witness, and the defendants excepted. The plaintiff obtained a verdict for $1250, and the judge ordered the exceptions to be first heard at the general term. Other exceptions were taken by the defendants' counsel during the trial, but I shall only consider that which relates to the admissibility of the wife to give evidence in her own behalf where she and her husband are parties defendant in an action for a personal tort committed by her alone.

The cause of action does not proceed from the husband alone, or from the husband and wife jointly, but from the wife exclusively. He is sued and made a party defendant in consequence of the marital relation, and in virtue of a rule of the common law that the wife could not be sued alone. Her coverture was always a good plea in abatement of the action, and she was not estopped or precluded by any acts or declarations of her own from availing herself of her coverture as a defense to an action when she was sued alone. In this action, therefore, she is the principal defendant. The proof must establish a separate cause of action against her, or the plaintiff can not recover judgment, and when that is established he is entitled to judgment against the husband as well as against the wife, upon the sole ground that he is her husband and she is not responsible in the action, alone. The action, therefore, is substantially an action against her; the judgment when recovered will be against her as well as her husband, and the execution will issue against both, and may be satisfied out of the property of both or either. The question is whether she is not entitled to the benefit of the modification of the law of evidence which allows parties to become witnesses in their own behalf. Much, very much, has already been written and said upon this subject. I shall not enlarge upon it, nor stop to examine the various adjudications, for I feel myself unable to add much, if any thing, to the force of the argument already rendered. Nothing short of an adjudication of the court of last resort will remove the ques-

tion from the field of litigation; and a few propositions will be all that I can profitably say concerning it.

At the common law husband and wife were excluded from giving evidence in each other's favor, upon two grounds: first, the general ground of interest; it being a universal rule to exclude all who had any interest in the subject of the litigation; and second, upon the ground of policy and the necessity of preserving unimpaired the confidence of the conjugal relation. Section 398 of the code of 1849 abrogated the ground of interest, declaring that no person offered as a witness shall be excluded by reason of his interest in the event of the action. This provision was qualified by those contained in section 399. But as a general rule interest, without something more in addition, ceased to be a ground of exclusion. In the case of husband or wife offered as a witness for each other, the ground of policy and the relation between the witness and the party to the action, plaintiff or defendant, still remained, and they were still incompetent to give evidence in favor of each other. To this effect is the case of *Hasbrouck* v. *Vandervoort and Hayward*, (5 *Seld.* 153.) Then came the act of the 13th April, 1857, amending section 399 of the code, by declaring that "a party to an action or proceeding may be examined as a witness in his own behalf, the same as any other witness," &c. The case of a married woman sued for a tort is certainly within the letter of this amendment. Whether she is sued alone or in connection with her husband, makes no difference; she is still a party—and as I have shown, the real and principal party—to the action, and within the letter of the statute. No one doubts the power of the legislature to take away the disability of a married woman to become a witness in her own behalf, and the question is one of construction, and not of power. What did the legislature intend by this amendment of the law of evidence? Did it intend by the words "a party to an action" a special or particular class of parties—parties who had nominal or real interests—parties who were

femes sole or femes covert, the latter sued with or without their husbands? If we accept what the legislature has said in very plain, concise and unequivocal language, as an indication of its meaning and intention, we must adopt the conclusion that the disability to give evidence in one's own behalf is removed from all who may become or be made parties to actions and proceedings. If it was intended to include all parties, and extend to them the benefits of the amendment, what other or better language could have been employed to signify such intention? I submit that none more appropriate or significant could have been employed. And if it was designed to perpetuate the disability of a particular class of parties—married women sued or suing in conjunction with their husbands—I submit the legislature would have said so, in words, and not left it to inference and implication. When the legislature speaks in plain, precise, positive and unambiguous terms, the courts are bound to accept what they have said for what they intend, rather than to seek an intention at variance with their expressed language in reasons and causes which, however cogent and controlling they may appear to us, may never have occurred to, or influenced them. The framers of this amendment knew, quite well, that married women with their husbands were, in numerous cases, necessary and indispensable parties to legal proceedings, and without whose presence upon the record complete and adequate remedies could not be administered. And it is reasonable to think that if this numerous class were to be excepted from the effect of the radical innovation in the old law of evidence, the legislature would have signified such intention in so many words.

A married woman, made a party to an action in connection with her husband, is within the spirit and reason as well as within the letter of the amendment. The common law, in excluding parties in interest and parties upon the record from being witnesses and giving evidence in their own behalf, proceeded upon the theory of human infirmity

rather than human virtue. It regarded the temptations of interest as stronger than the sanctions of truth, probity and personal honor; and it therefore refused to hear the testimony of a witness, however conscientious and pure he might otherwise be, who was a party to a litigation, or who had the slightest interest in its result. The litigation of the courts relates almost exclusively to the conduct and the acts of men toward one another. And the first obvious effect of the rule of evidence referred to, was to exclude as witnesses and deprive the courts in their inquiry after truth and right of the benefit of the testimony of those who knew most, and could speak best, about the transaction which was the subject in dispute. There is too much reason to think that the good which the application of this rule produced, was more than overbalanced by the ills which flowed to suitors and the public morals in the suppression of the truth and perversion of justice. The amendment of the law proceeds upon the opposite theory. With a higher estimate of human nature, and a wiser appreciation of the value of evidence, it no longer refuses to hear those who know most about the truth of the transaction, but accepts the testimony of parties to the controversy, and persons interested, subject to be weighed in the scale of credibility, and its value tested by the position which the witness maintains to the controversy, and the circumstances under which his evidence is given. The principle of the amendment is general, not special. It applies to all who may be interested in an action as parties thereto; and no good reason can be assigned why married women, suing or being sued with their husbands, should form an exception to the rule adopted to correct what most men had come to regard as a great evil.

There is another reason why the construction I contend for should prevail, and a party occupying the place of the defendant Ellen Hooper should be admitted to an examination in her own behalf, quite as cogent as any I have named. The principle has prevailed in the several amendments to section 399,

that a party should not be examined in his own behalf against parties who are representatives of a deceased person, in respect to any transactions had previously between the deceased person and the witness. The purpose of the law was to hear both sides, and to insure to both parties to the same conversation or transaction the opportunity to speak in regard to what was said and done. Both were to be heard, and the testimony of one contrasted with that of the other. And so it provided that where one of the speakers or actors was dead the law closed the lips of the other speaker and actor also. The value of this provision all will recognize and uphold. And it is not too much to say that the amendment would have been fruitful of very great mischief, and could not have secured as it has done the favor of jurists and judges and the public at large. The construction contended for by the plaintiff in this action sets aside this salutary principle. He claimed and exercised the right, upon the trial, to be examined in his own behalf, while he denied the same right to his adversary, and thus the vital element of the amendment was disregarded and set aside. Both of them may have been, and doubtless were, the most material witnesses of what occurred. They were both actors, and the only actors, in the transaction which was the subject of the action. Without a manifestation of the clearest intention on the part of those who framed the amendment, we should not exclude the defendant from its benefits upon the hypothetical ground that such a construction might disturb the harmony of the conjugal relation. The legislature have certainly manifested no such purpose. What they have said indicates a contrary intention. For in the amendment of April 16, 1860, as an exception to the general rule of the 399th section, they declare "that neither husband nor wife shall be required to disclose any communication made by one to the other." This provision was wholly unnecessary if they were not to be examined in their own behalf, and shows an effort at least on the part of the law makers to avert the evil results from

such examinations to the confidence and peace of the conjugal relation.

I have said more than I designed when I set out. The decision in *Marsh* v. *Potter*, (30 *Barb.* 506,) based on an able and well considered exposition of the question involved, is one which we should follow until it is reversed by the court of last resort.

There should be a new trial, with costs to abide the event.

[Kings General Term, February 13, 1865. *Brown, Lott, Scrugham* and *J. F. Barnard*, Justices.]

43 298
49 507

The People, *ex rel.* Norman W. Rose, *vs.* The Board of Supervisors of the County of Livingston.

Bonds issued by or under the authority of the board of supervisors of a county, to the supervisors of the several towns, in pursuance of a resolution passed by such board under the 8th chapter of the laws of 1864, for the purpose of paying bounties to recruits that shall be mustered into the service of the United States to the credit of the respective towns, are county bonds, and binding as such upon the county at large.

Two distinct methods of raising money are provided by the statute; one being to *borrow* it, and the other, to raise it by *taxation*. If a board of supervisors resolves to borrow the money required, it is authorized to borrow upon the credit of the county, and to direct the bonds of the county to be issued by the county treasurer, to each supervisor, or to borrow money on such bonds for each supervisor who may apply for the same, to pay a bounty to each recruit that shall be mustered into the United States service from the respective towns of the county.

The board is also authorized to allow the towns to borrow upon their own credit. But unless the board provides by resolution for the issuing of town bonds, or of bonds upon the sole credit of the towns, or of any town, bonds so issued by such towns, or any of them, will be unauthorized and invalid.

The board of supervisors has no right to lend the bonds of the county to the towns, so as to create town debts.

Town debts can only be lawfully authorized under the act of 1864, in the shape of town bonds; and such town bonds can only be issued by the town

authorities after a vote of the town duly had at a regular town meeting called and held for that purpose.

County bonds, issued under the authority of the board of supervisors, for the payment of bounties, create a county debt, which can only be lawfully assessed upon the whole county. The board can not lawfully make an unequal assessment upon the several towns, to pay such debt.

Such bonds will not become town debts by force of any subsequent vote or resolution of the towns respectively, at special town meetings called for that purpose, but will remain county bonds, and be binding solely upon the body of the county at large.

Bonds having been issued by a board of supervisors, on the credit of the county, the board may properly and lawfully adopt a resolution directing that there be assessed, levied and collected upon the taxable property of the county an amount sufficient to pay the sums due thereon.

ON the 3d day of August, 1864, the defendants passed a resolution authorizing, among other things, the issuing of county bonds to each supervisor of the county who should call for them, to pay a bounty not exceeding $300, to each recruit that should be mustered into the service of the United States to the *credit* of their respective towns, and declaring that "in the payment of said bonds, the board of supervisors assess such sums on the towns respectively in proportion to the amount of bonds taken by each town, through its supervisor." On the 2d of September, 1864, the defendants, by resolution, authorized each town to increase its bounty to a sum not exceeding $1000, "subject to the same regulations as prescribed by the resolution of August 3, 1864." In pursuance of these resolutions, different towns took bonds or money varying greatly in amount, and procured volunteers at different rates. On the 30th day of November, 1864, the same board passed a resolution that the amount necessary to pay these bonds be assessed and collected "as other county taxes are assessed, levied and collected," and proceeded to assess in pursuance thereof, directing, however, that the tax should be spread upon a separate tax roll. The relator feeling aggrieved by the resolution of November 30, and subsequent proceedings, sued out a writ of certiorari, to reverse such resolution and proceedings.

George F. Danforth and *Scott Lord*, for the relator.

T. R. Strong and *A. J. Abbott*, for the respondent.

By the Court, E. DARWIN SMITH, J. In the case of *John Magee and others* v. *George D. Cutler and others, Supervisors of Livingston county*, decided at the last December term of this court,(*a*) we held that the bonds issued by or under the authority of the board of supervisors of Livingston county under the resolution passed by the board on the third of August, 1864, were county bonds, and binding as such upon the county at large. The same decision had been made by my brother, James C. Smith, at special term, in an action by James Faulkner and others, against Chauncey Metcalf, county treasurer of Livingston, to restrain the issuing of any such bonds to the supervisor of the town of Ossian in said county.(*b*)

It being claimed that in the decision in both cases, a portion of the resolution of the 3d of September had not been considered by the court by reason of a mistake in setting out a copy of said resolution in the proceedings in the said case of *Faulkner* v. *Metcalf*, the certiorari in this case was allowed, to bring up the said resolution and the proceedings of the board of supervisors relating to the same for reconsideration. Upon a rehearing of the question, we remain of the opinion expressed in the case of *Magee et al.* v. *Cutler et al.* (*supra*,) that the bonds authorized and issued under said resolution were properly county bonds.

That portion of the said resolution omitted in the proceedings in the case of *Faulkner* v. *Metcalf*, treasurer, was the latter part thereof, which states, that in the payment of said bonds, the board of supervisors will assess such sums on the towns respectively in proportion to the amount of bonds taken by each town through its supervisor. The part of the said resolution omitted does not, we think, change or materially

(*a*) Ante, p. 239. (*b*) Ante, p. 255, note.

affect our construction of the said resolution, so far as relates to the question, whether the bonds issued under said resolution are or are not county bonds. The 22d section of the act of 1864, under which the resolution in question was passed, authorizes the boards of supervisors of the counties of this state to raise money for the purpose of paying bounties to volunteers into the naval or military service of the country in two modes. They were authorized to provide for raising money upon the credit of their respective counties for the use of the said county, or upon the credit of any city or town thereof, for the sole use of said city or town; or to raise such money by levying and imposing a tax upon the taxable property of their respective counties for the use of said county, or upon any town or city thereof, for the sole use of such town or city. These two modes of raising money were entirely distinct. One was to *borrow money*, and the other to raise it by *taxation*.

The board of supervisors of Livingston resolved to *borrow* the money which was required. For this purpose they were authorized to borrow upon the credit of the county, or to provide for allowing the towns to borrow upon the credit of the respective towns of the county. They adopted the former course. They authorized the county treasurer of said county to issue the bonds of the county, bearing annual interest, to each supervisor of said county, or to borrow money on said bonds for such supervisors as might call for the same to pay a bounty not exceeding $300 to each recruit that should be be mustered into the United States service from the respective towns of said county. Each supervisor was to be the recruiting and disbursing agent for his town, and draw such amount from the treasury as would pay for the filling the quota of his town. The money thus to be drawn from the treasury of the county was *county money*, borrowed on the sale of county bonds or of bonds issued upon the credit of the county, and if the bonds were taken by the respective supervisors of the several towns instead of money, they were still

county bonds issued in like manner by the county treasurer in pursuance of such resolution, and on the sole credit of the county. No provision is made in said resolution for the issue of town bonds or of bonds upon the sole credit of the towns, or of any town of said county, and no such bonds were issued by the towns respectively so far as we know; certainly the towns had no authority to issue any such bonds, and bonds issued by them, or any of said towns, would be clearly unauthorized and invalid.

The provision in said resolution, that in payment of said bonds, the board of supervisors assess such sums on the towns respectively in proportion to the amount of bonds or money taken by each town through its supervisor, does not change the character of said bonds, or convert them into town obligations. This portion of the resolution is of no legal force. The board of supervisors had no right to lend the bonds of the county to the towns so as to create town debts. Town debts could only be lawfully authorized under the act of 1864 in question, in the shape of town bonds—and such town bonds could only be issued by the town authorities after a vote of the town duly had at a regular town meeting duly called and held for that purpose. This provision in the resolution of the 3d of August, to assess the amount received by the supervisors of said towns, on said bonds, or moneys in payment of said bonds, was an excess of authority on the part of the board of supervisors, was an unauthorized blending in the resolutions of the processes for the payment of money borrowed on the credit of the towns with that for raising money by taxation before its expenditure. These processes or modes of proceedings are entirely distinct. The supervisors could only assess the towns separately to raise the money requisite to pay town bonds duly authorized and issued, or money voted to be raised by taxation by the town meetings for the use of the towns. They could not assess such money to pay borrowed money, unless it was to pay lawful town bonds duly authorized and issued in shape to create

a lawful town debt. That portion of the resolution which states that in payment of the bonds the board will assess the towns respectively, in connection with the issue of county bonds to secure borrowed money, in no proper sense creates any contract. It is simply an abortive suggestion or proposition. The board had no right to carry it into effect in payment of county bonds.

These bonds created a county debt which could only be lawfully assessed upon the whole county. The board could not lawfully make an unequal assessment upon the respective towns to pay such debt. This provision doubtless was inserted in the resolutions with a view to such action of the respective towns through special town meetings called for that purpose, as would authorize the supervisors to assess upon the respective towns the amount of the bonds issued, or money paid to their respective supervisors; and from the proceedings had before us in other cases we may assume, if we can not judicially know, that such town meetings were in fact held in all or most of the towns of said county, in which appropriate resolutions were duly passed, consenting to the receipt and use of such bonds, or the proceeds thereof, by their respective supervisors, for the purpose of filling the quotas of said towns under the call of the general government for volunteers. Such action of the towns or of the town meetings can not change the operation of these bonds.

The resolutions of such town meetings had no legal force or effect. The bonds issued were none the less county bonds, and binding solely upon the body of the county at large. They did not become town debts by force of any vote or resolution of the towns respectively. The towns could not borrow county bonds, or contract any debts in any way, except by the issuing of town bonds previously authorized by proper resolutions of the board of supervisors for that purpose. No town is liable, as a town separately, to pay any of these bonds, nor can it be assessed for any number of such bonds as issued or lent for its exclusive use or benefit, nor in any way be com-

pelled to pay any amount more than its ratable proportion of the debts contracted by the issue of such bonds. The point that the money raised upon the issuing of these bonds can not be deemed raised for the use of the county, was raised and discussed and decided in the case of *Magee* v. *Cutler*.

The argument that the resolutions of the board of supervisors of the 30th of November, to assess these bonds, so far as they are due, or the interest which has accrued thereon, upon the county at large, does injustice to some of the towns in making them pay a larger amount in the liquidation of the said bonds than they would be compelled to pay, if each town was separately assessed for its proportion of the debt contracted, is one which might have been appropriately addressed to the legislature, or to the board of supervisors acting in its legislative capacity. It is not one which we can consider in reviewing the resolutions of the board of supervisors acting within the limits of their lawful discretion.

The legislature has authorized the board of supervisors of the respective counties to legislate for their respective counties and impose taxes or borrow money to pay bounties for volunteers from the counties. The counties are comprised respectively of many towns, but the board of supervisors of each county legislates for all the towns of the county, as composing together a single civil or political organization or division of the state.

These bonds having been issued on the credit of the county, the resolution passed by the board of supervisors on the 30th November, directing that there be assessed, levied and collected upon the taxable property of the county, the amount which would be sufficient to pay the sums due thereon, was properly and lawfully passed.

It provided for the payment of such bonds, as all other state and county taxes are paid. There may be some inequality in such taxation between the towns, as such, but there is none between the inhabitants of the county at large. The

tax is imposed upon the taxable property of the citizens of county, and property in all communities must bear the burdens of the government. If some towns are richer than others and will therefore pay a large proportion of the tax, so are some citizens richer than others, and it is not unjust, as it seems to us, that the whole property of the county be assessed to pay the bonds in question. At least, the legislature had settled this question otherwise, as we held in the case of *Magee* v. *Cutler*. Judgment, I think, should be given for the respondents in the case, and affirming the proceedings of the board of supervisors of the 30th of November, 1864, with costs.

Ordered accordingly.

[MONROE GENERAL TERM, March 6, 1865. *Johnson, J. C. Smith* and *E. Darwin Smith*, Justices.]

CORBITT *vs.* MILLER.

The facts that a note sued on was made by the defendant without consideration, and was delivered to the payee solely for his accommodation, and that it was transferred by the payee to the plaintiff after it became due, will not, alone, constitute any defense.

In an action by the indorsee of a promissory note, against the maker, the answer alleged that the note was made and given to O. for the purpose of enabling him to raise money to buy or pay a mortgage held by the plaintiff on property owned or claimed by O.; that the note was not used for that purpose, but remained in the hands of O. until after the same became due, and was then transferred to the plaintiff. *Held*, that if this could be deemed a misappropriation, in any sense, in order to render it available as a defense, the answer should have shown that it was, or might have been, injurious to the defendant.

But the answer merely alleging that it was expected and intended that the plaintiff should have the proceeds of the note, after it was negotiated, and that instead of the proceeds he had taken the note; *it was held*, that this was no misappropriation, within any of the cases.

Corbitt *v.* Miller.

THIS was an action upon a promissory note. The complaint alleges the making of the note by the defendant, payable to the order of David O'Hearn, and its indorsement for value received to the plaintiff. These allegations are not denied in the answer. But the defense alleged is, that the note was an accommodation note, made and delivered to O'Hearn to enable him to raise money to pay a mortgage owing by him to the plaintiff; that the said O'Hearn did not raise money upon it, but transferred it to the plaintiff after due. The cause was tried by the court without a jury. On the trial, the attorney for the plaintiff moved the court that the plaintiff have judgment on the pleadings, and without any evidence being offered, upon the ground that the answer did not state any thing constituting a defense. After hearing the plaintiff's attorney for, and the defendant, in person, in opposition to the motion, the court decided that the answer contained, or constituted, no defense, and ordered judgment for the plaintiff, on the pleadings, for $114 damages; to which decision and ruling of the court the defendant excepted. The defendant moved, at a special term, on the exceptions, for a new trial; which motion was denied, and the defendant appealed to the general term.

Geo. W. Miller, appellant, in person. I. A note, or bill transferred after maturity, is taken subject to *all* equities or defenses existing in relation to it, in the hands of the person from whom it is taken. (3 *Kent's Com. 5th ed.* 90, 91. *Story on Prom. Notes*, § 178. *Chitty on Bills*, 217, 218, 219. 1 *Parsons on Notes and Bills*, 274, 275. *Edwards on Prom. Notes*, 315–322, 686–91. *De Mott* v. *Starkey*, 3 *Barb. Ch.* 403–6. *Claflin* v. *Farmers' &c. Bank*, 25 *N. Y. Rep.* 295.) The answer in this case shows a perfect defense to the note in the hands of O'Hearn, the payee, and the person who transferred it to the plaintiff after maturity.

II. Want of consideration, or the fact that the note was an accomodation note, was a good defense as between the

maker and payee. This will not be disputed. Still a party taking such a note, even with knowledge that it was accommodation paper, is protected, if he takes it *bona fide* before due; not so, however, if he takes after dishonor or maturity. Before the time for payment has elapsed it is considered in the nature of money; the accommodation maker loans his credit until the time named for payment, but after that time has expired, he can no longer be said to, or to intend to, loan either money or credit, and the very fact that the time at which he, by the note, appears to have agreed to pay, has expired, and he has not paid, is notice to every body that he no longer intends or agrees to pay. In such case the taker can not be said to rely on the credit of the maker, but takes solely on the credit of the assignor or indorser. (*Parsons on Notes and Bills*, 192, 261, 2. *Edwards on Bills*, 315–322, 686–691. *Hackley* v. *Sprague*, 10 *Wend.* 114. *Driggs* v. *Rockwell*, 11 *id.* 505–10. 4 *Denio*, 63.)

III. Another complete defense contained in the answer is, that the note was made to be used for a *special* purpose, and was *not* so used. This is a good defense against every one except a *bona fide* holder, without notice. (1 *Hilton*, 337. *Prentiss* v. *Graves*, 33 *Barb.* 621.) It is not necessary to allege injury from the diversion. (*Rochester* v. *Taylor and Davis*, 23 *Barb.* 18. *Edwards on Bills*, 316, 317, 318, 319.)

IV. The note in this case never had any legal inception. It was made without consideration and was not transferred during its life or before maturity. It had no vitality in the hands of the payee; was no better than blank paper until negotiated, even before it came due, and remaining in his hands until after maturity, it ceased to be, or be entitled to the immunities or protections extended to negotiable commercial paper. All that, before maturity or dishonor, could make it a valid and binding security as against the maker, was the effect of the rules established in regard to negotiable commercial paper. By force of those rules, an act of the payee could give it legal inception before due; but being dishon-

ored, or rather remaining a mere note in form but with no substance or real existence, until after the day named for payment, no act of the holder or payee can bring it to life or give it a legal inception or existence, as against the maker. (*Marvin* v. *McCullum*, 20 *John.* 288. *Kent* v. *Walton*, 7 *Wend.* 256. *Dowe* v. *Schutt*, 2 *Denio*, 621.)

J. C. Cochrane, for the respondent. I. As to the maker, there is never a consideration for an accommodation note. It is sufficient if there is a consideration between the party for whose accommodation it is made and the holder. (*Commercial Bank* v. *Warren*, 15 *N. Y. Rep.* 578.)

II. The note was used substantially for the very purpose for which it was made. Whether O'Hearn got the note discounted and paid the avails to the plaintiff, or transferred the note to the plaintiff for the purpose of paying him, could make no difference to the defendant. (*Spencer* v. *Ballou*, 18 *N. Y. Rep.* 327–332. *Bank of Rutland* v. *Buck*, 5 *Wend.* 67. *Mohawk Bank* v. *Corey*, 1 *Hill*, 513. *Powell* v. *Waters*, 17 *John.* 176. *DeZeng* v. *Fyfe*, 1 *Bosw.* 335. 1 *Parsons on Notes*, 226, *n. m.* 2 *id.* 27, 28.)

III. The fact that a note is transferred after it becomes due is never a defense, unless a defense would have existed if transferred before due, with notice of all the circumstances. The transfer past due *never creates a defense*, but merely permits a defense if one exists. In other words, a note is then the same as non-negotiable paper.

By the Court, JOHNSON, J. The facts stated in the answer, that the note in question was made by the defendant without consideration, and delivered to O'Hearn, the payee, solely for his accommodation, and that it was transferred by O'Hearn to the plaintiff after it became due, must be taken to be admitted. But these facts alone constitute no defense. This seems to be well settled. (2 *Parsons on Notes &c.* 29. *Charles* v. *Marsden*, 1 *Taunt.* 224. *Caruthers* v. *West*, 11

Adol. & Ellis, 143. *Sturtevant* v. *Ford*, 4 *Man. & G.* 101 *Thompson* v. *Shepherd*, 12 *Mete.* 311.) In *Charles* v. *Marsden*, (*supra*,) Lawrence, J. said there was "no reason why a bill might not be negotiated after it was due, unless there was an agreement restraining it." And he further remarked, that if there had been such an agreement it should have been stated in the plea, and might then have constituted a defense. To the same effect is *Stein* v. *Yglesias*, (1 *Cromp., Mees. & Ros.* 565.) No such fact is here stated in the answer. In the case of accommodation paper it is quite obvious that the indorsee takes greater rights than his indorser had. The payee can not sue an accommodation maker or indorser at all; because, as between them, no consideration passes. But it is different with the indorsee of the payee; because the very object being to accommodate and benefit the payee, his transfer for a valuable consideration fulfills the intention, and is binding upon such maker or indorser. And notice to the indorsee in such a case is of no moment, and adds nothing by way of defense. (*Brown* v. *Mott*, 7 *John.* 361.)

The question then arises, whether there has been any such misappropriation of the note as to constitute a defense in favor of an accommodation maker. The answer alleges that the note was made and given to O'Hearn, "for the purpose of enabling O'Hearn to raise money to buy or pay a mortgage held by the plaintiff on property owned or claimed by said O'Hearn." It then alleges that the note was not used for such purpose, but remained in the hands of O'Hearn until after the same became due, and was then transferred to the plaintiff. If this could be deemed a misappropriation in any sense, there is nothing in the answer to show, or even suggest, that it has been or could be in any way injurious to the defendant. This, I think, is necessary to constitute a defense. (2 *Parsons on Notes and Bills*, 28.) The answer does not even allege that the mortgage has not been paid by the transfer; and if it did, there is nothing to show that the

defendant was in any way holden for the payment of the mortgage, or had any interest in the mortgaged property. He expected to become holden for the amount of the note, and it can be of no possible consequence to him whether it was transferred to one or another, so long as he had no interest in the application of the proceeds. But in truth no misappropriation is alleged. The answer only shows that it was expected and intended that the plaintiff should have the proceeds of the note after it was negotiated, and that instead of the proceeds he has taken the note. This is all that is strictly or even substantially alleged. This is no misappropriation within any of the cases. The substantial object has been complied with, so far at least as the defendant is concerned, and the judgment is right, and should be affirmed.

[Monroe General Term, March 6, 1865. *Johnson, J. C. Smith* and *E. Darwin Smith*, Justices.]

Roy *vs.* Baucus.

The order of a county judge, made in proceedings supplementary to execution, for the payment of money in the hands of a third person, will not affect the rights of an assignee who has advanced money on the faith and security of the fund in good faith, and who is not a party to the supplementary proceedings.

The code does not contemplate the adjudication of the rights of assignees, by a judge, in so summary a manner. When the fact of the assignment of a fund in the hands of a depositary, by the owner, is made known to the judge, he ought not to order it to be paid over to the judgment creditor.

If, with notice of the assignment, and of the claim of the assignee thereunder, the depositary pays over the fund to a judgment creditor of the owner, even upon the order of a county judge, he does so at his peril.

THIS was a motion for a new trial, on a bill of exceptions ordered to be heard at the general term in the first instance. The action was brought against the defendant to

recover $70 paid to him as an executor of the will of John Roy, deceased. The will appropriated the interest of $2000 to the testator's widow, and appointed the parties to this suit executors. The widow, in October, 1858, assigned this interest to the plaintiff, "to demand and receive it, but to hold the same for my sole use and benefit, and out of the same to reimburse himself for any and all moneys that he may advance to me from time to time, for my support." The widow was very aged—was poor, having this fund alone for her support. After the receipt of the money by the defendant, one Hull took supplemental proceedings against her, to satisfy a judgment he had against her. Subsequently a county judge ordered the defendant to pay the money to Hull, on his debt. The plaintiff was no party to the proceedings. The testimony satisfied the judge at the circuit (at least that there was enough to go to the jury upon) that the defendant had notice of this assignment, prior to his payment of the money.

R. A. Parmenter, for the plaintiff.

W. A. Beach, opposed.

By the Court, PECKHAM, J. I see no objection to the assignment. Its good faith and fairness are not questioned. It is not prohibited by the statute against the assignment of an interest "in a trust for the receipt of the rents and profits of land." (3 *R. S. 5th ed.* 21, § 82.) It is not such a trust.

The assignment being valid, the plaintiff was entitled to this money for advances he had made, as the testimony showed, on its faith and security; all which, as I think the testimony showed, was well known to the defendant before he paid the money, and prior to the order for the payment, made by the county judge. He was careful, however, to take security and indemnity, on paying it over. The order of the

county judge could not affect the rights of this plaintiff. He was no party to that proceeding, and was not bound by it The code never contemplated the adjudication of the rights of assignees, by a judge, in this summary manner. The fact of the assignment being made known to the judge by the testimony, I think he erred in ordering the payment.

Within the spirit of the 299th section of the code this claim should not have been so disposed of. "If it appear that a person alleged to have property of the debtor or indebted to him, claims an interest in the property, adverse to him, or denies the debt, such interest or debt shall be recoverable only in an action against such person, by the receiver; but the judge may by order forbid a transfer or other disposition of such property, &c. until a sufficient opportunity be given to the receiver to commence the action and prosecute the same to judgment and execution," &c.

The spirit of that provision applies to this case, and should have controlled the action of the judge. Nor is it any answer to say that the order was obligatory until it was reversed. If it were erroneous, as to this defendant, he should have seen that it was reviewed and reversed, or have complied with its directions, at his peril. He well knew that the plaintiff claimed to be the assignee and owner of this claim. If he were so in fact, then this defendant did not owe the judgment debtor any thing. He owed this plaintiff; and he can neither pay that debt by paying the judgment debtor after notice of the assignment, or by complying with an order entirely void, so far as it respects this plaintiff. Fragile and feeble would be the rights of an assignee if they could thus be adjudged and finally determined in such a summary proceeding, to which he was not even a party.

The rights of the parties must therefore be settled in this suit. If, under the circumstances of this case, with notice of the assignment and of the claim of the plaintiff thereunder, both of which, I think, the evidence sufficiently

establishes, the defendant thought proper to pay over this money, he paid it at his peril. The plaintiff, I think, is both legally and equitably entitled to it, and the defendant must resort to his indemnity, to secure himself.

A new trial should be granted; costs to abide the event.

[Albany General Term, December 7, 1863. *Hogeboom*, *Peckham* and *Miller*, Justices.]

The People, *ex rel* Arms, *vs.* Austin and others.

The mayor's court of the city of Albany has power to grant new trials, or to set aside a judgment on the merits entered on the report of a referee.

THIS was a motion to set aside the writ of prohibition issued in this case, forbidding the mayor's court of Albany to proceed to hear the argument on a motion, or to set aside the judgment entered in that court upon the report of a referee. The writ was granted by Justice Peckham without a particular examination, on the assumed ground that the mayor's court had no power to grant such a motion.

S. F. Higgins, for the motion.

H. Smith, opposed.

Peckham, J. The mayor's court in the city of Albany, established under the city charter, was declared to be a court of common pleas for said city. (3 *R. S.* 317. *City Laws*, 273, § 34.) Courts of common pleas had power expressly granted by statute to grant new trials, &c. (2 *R. S.* 208, § 1.)

That courts of common pleas had power to grant new trials was adjudged in *Delancey* v. *Brownell*, (4 *John.* 136:) also to set aside reports of referees. (*Ex parte Bassett*, 2 *Cowen*,

458) And see, as to their powers, 3 *Caines' Rep.* 38; 5 *Cranch*, 173; *Foot* v. *Stevens*, (17 *Wend.* 483.)

The only question in the case is, whether the code has changed the powers of that court and deprived it of the right to grant new trials, or set aside a judgment on the merits entered on the report of a referee.

I understood the counsel for the relator to insist, at first, that the mayor's court had no power in any case to grant a new trial on the merits, citing, among other cases, 12 *Wend.* 221; 8 *Cowen*, 134; *People* v. *Dalton*, (15 *Wend.* 584;) and referring to sec. 33 of the code as to the jurisdiction of that court. Subsequently I understood him to concede that the court had such power, as to cases tried by a jury. If that were so, there would be no remedy whatever as to a report of a referee, in that court, against evidence. This court could not set it aside upon any such ground, on appeal. I do not think the legislature would intentionally have made such an alteration of the law, or would have made any such discrimination between referees in this court and in a mayor's court. The report of a referee in this court being open to review on the facts, while it is thus held conclusive if the case be pending and the referee be appointed in a mayor's court, no reason can be assigned for such a distinction.

I do not think section 268 of the code applies to mayors' courts. Its phraseology is not adapted to them. It speaks of appealing to the "general term of the same court" for review, when there is no such thing as a general term, as distinguished from a special term, in that court. And section 348, to which it refers as prescribing the mode of the appeal, &c., applies in terms exclusively to courts other than mayors' courts—to courts having general terms. It is true that section 8 makes these two, (§§ 268 and 348,) with a great many others, applicable generally to all mayors' courts, as well as to the supreme court. But applicable so far as they fit—so far as they may be applied—certainly not more than that. How can section 348 be applicable to mayors

courts, generally, when the courts to which it applies, alone, are named in the section?

Section 323, I think, has no application to this case. That was intended, obviously, simply to substitute appeals for writs of error, and should be construed in reference to its plain purpose, and limited to that. It has been lately settled in the court of appeals that the mayor's court is the only tribunal having power to review a judgment there upon questions of fact. (*Thurber* v. *Townsend*, 22 *N. Y. Rep.* 517 And see 12 *Barb.* 126.)

The writ must be set aside, but without costs, as the question is somewhat new, under the code, and the provisions are not entirely clear. If the plaintiffs wish to review this decision, proceedings may be stayed until the hearing of the appeal, provided they perfect their appeal within ten days after service of the order made herein.

[Albany Special Term, December 29, 1863. *Peckham*, Justice.]

Binck *vs.* Wood.

The maker of a promissory note paid $100 thereon, to the payee, who omitted to indorse or give credit therefor, but sued the maker and surety, and recovered judgment for the full amount of the note, the suit not being defended, and issued an execution thereon; whereupon the surety paid the judgment, and taking an assignment of the principal's claim, brought an action to recover back the payment of $100. *Held* the action would not lie.

The law will not uphold the faith and trust that allow a man when sued upon a note, to lie by and rest upon the belief that the plaintiff will not do what he has notified the defendant, in the summons and complaint he will do—viz. take judgment for the whole amount of the note, without crediting a previous payment—and then bring an action to recover back a part of the judgment recovered, on the ground that his just confidence has been betrayed.

The case of *Smith* v. *Weeks*, (26 *Barb.* 463,) overruled.

Binck *v.* Wood.

THIS is an action by the surety on a $350 note to recover $100 paid thereon by his principal, which the payee omitted to credit, but sued the maker and surety, recovered judgment for the full amount (the suit not being defended,) issued execution thereon, and this plaintiff, the surety, paid the judgment and then brought this action to recover back the $100. The principal in the note also assigned the same claim to the plaintiff. The referee reported in favor of the plaintiff, and the defendant appealed.

A. Bingham, for the plaintiff and respondent.

W. C. Benton, for the appellant.

By the Court, PECKHAM, J. It is impossible, I think, to sustain this report upon any principle known to the law. It seems to be based upon a decision of this court in *Smith* v. *Weeks*, (26 *Barb.* 463.) The opinion there was delivered by Justice Harris, and it sustains this case. Had the learned justice, in his opinion, examined the authorities in this state and still arrived at the same conclusion, we should feel bound by the decision. But no authority in this state tending to such a result is alluded to, nor is a principle stated which we think can sustain this action.

The authorities cited and relied upon, are *Rowe* v. *Smith*, (16 *Mass. Rep.* 306;) *Fowler* v. *Shearer*, (6 *id.* 14;) and *Loring* v. *Mansfield*, (17 *id.* 394.) The first case, it is conceded, is an authority directly on the point. There the plaintiff had paid $50 on a $400 note and taken a receipt Afterwards he was sued on the $400 note and judgment entered against him for the whole amount. An action by the plaintiff to recover back the $50 was sustained. Parker, Ch. J. stated that his "first impression was against this action." Finally it was sustained on the ground "that the defendant had received $50 which he is not entitled to retain. That he can not conscientiously retain it." The

editor of a late edition of the Massachusetts Reports says this decision can not stand in law. The ground of the recovery will be examined hereafter.

Fowler v. *Shearer* was an action against an attorney, for not applying money given to him for that purpose, upon a demand in his hands for collection against the plaintiff. That action was sustained, on the ground that the attorney "had been guilty of a breach of the trust reposed in him." There is some plausibility in the claim for sustaining such an action, if the attorney for the purpose of applying the money could be regarded as the agent or servant of the plaintiff in the second action. If he were so in fact, the action would of course be for the breach of trust, and this case could not be held as any authority for sustaining this action.

The case of *Loring* v. *Mansfield*, (17 *Mass. Rep.* 394.) involves the same principle decided in *Rowe* v. *Smith*, (16 *Mass. Rep.* 306,) with this difference of fact, that in the former case the plaintiff in the second action appeared in the first and contested the recovery, but did not attempt to prove the payments for which he afterwards brought an action. The court held, however, that he could not recover; the ground being substantially, that having been in court he ought to have proved his whole defense when he had an opportunity. In neither case was there any actual trial as to the payment claimed to be recovered. This case, therefore, overrules *Rowe* v. *Smith*. The court in 26 *Barb.* also referred generally to *Witcomb* v. *Williams*, (4 *Pick.* 228;) *Gary* v. *Hull*, (11 *John.* 441;) and *Cobb* v. *Curtiss*, (8 *id.* 470.) Neither of these cases tends in the remotest degree to sustain the position for which they were cited. In the first the action was to recover for an over payment made by mistake. The court say: "In this case a cause of action has been shown, independent of the judgment; nor was the proof of the judgment at all material to the merits of the case."

In *Gary* v. *Hull*, the defendant below, Gary, had recov-

ered a judgment against Hull for $40. It was then agreed that Hull might pay it in bark. The bark was delivered, but the parties not agreeing on the price, the defendant issued execution on his judgment. The plaintiff then brought an action for his bark, and it was held to lie, on the ground that the agreement to pay the judgment had been waived by the issuing of the execution. That it had been rescinded by mutual consent.

Cobb v. *Curtiss* was an action for breach of contract, for not discontinuing a suit in a justice's court after it had been settled, the subject matter satisfied, and the plaintiff had agreed to discontinue. On these facts the right to recover was plain. The court say: "This suit was brought for breach of an agreement to discontinue the former suit, and this breach would be the same, even if the former recovery had been for a just debt."

Upon this review it will be perceived that the only authority sustaining the court in *Smith* v. *Weeks*, (26 *Barb.*) is the case of *Rowe* v. *Smith*, in 16 *Mass. Rep.* The ground on which it stood was overruled in *Loring* v. *Mansfield*, (17 *Mass. Rep.*) before referred to. It was just as "unconscientious" for a party to retain the money in the one case as in the other. It was not litigated at all in the latter, though the party appeared to litigate another question, viz. usury.

The contrary doctrine, it is conceded, is held in every other state to whose authorities we have been referred. (*Tilton* v. *Gordon*, 1 *N. H. Rep.* 33. *Broughton* v. *McIntosh*, 1 *Ala. Rep.* 103. *Mitchell* v. *Sanford*, 11 *id.* 695.) In our own state the authorities are numerous and uniform. (*Loomis* v. *Pulver*, 9 *John.* 244. *White* v. *Ward*, *Id.* 232. *Batley* v. *Button*, 13 *id.* 187. *Walker* v. *Ames*, 2 *Cowen*, 428.) The last case was especially hard and unconscionable. There had been a recovery on an account and also on a note given on settlement of the same account. The defendant in that recovery then sued to recover back one half of the judgment thus improperly recovered. The court held the action would

not lie. "That there could be no end to litigation nor any security to a person" if such an action would lie. (*See also Dey* v. *Dox*, 9 *Wend.* 129; *Edwards* v. *Stewart*, 15 *Barb.* 67; *Canfield* v. *Monger*, 12 *John.* 347; *Grant* v. *Button*, 14 *id.* 377.)

We are referred to no authority in England that sustains this action. The contrary is settled in *Marriat* v. *Hampton*, (7 *T. R.* 269,) where the remark is made, quoted *supra* in *Walker* v. *Ames;* and see *Kist* v. *Atkinson*, (2 *Camp.* 63.) Nor can I find any principle that will uphold this action. So far back as legal decisions are reported, it has always been held that you could not overhaul, in another action, what had once been adjudged by a court of competent authority, having jurisdiction of the parties and of the subject matter adjudged. The subject was fully discussed in the court of errors in *Le Guen* v. *Gouverneur*, (1 *John. Cas.* 436,) and the rule laid down much broader than is required to defeat this action. The judgment is equally a bar, whether obtained by default or after a trial, as to all matters necessarily adjudged by the judgment. It concludes parties and privies as to all matters of fact necessarily determined by the judgment, so that they can not be overhauled in another suit.

A. sues B. on a note void for usury, duress or under the statute against betting and gaming, or extinguished by accord and satisfaction, payment or otherwise, and gets judgment by default; why can not B. sue him and recover the amount back? Surely it is "unconscientious" that A. should retain this money. He can not simply because the law has judicially determined against his cause of action. It has adjudged that the note was not void or invalid, and so long as that judgment stands you can not again, in another action, litigate any such question. Payment extinguishes a note; a set-off or recoupment does not, until a judgment of the court after trial has so declared. Payment extinguishes a debt as fully and effectually by the act of the parties, as a set-off can do when so declared by the judgment of a com-

petent court. A judgment on a note necessarily determines its validity, and therefore that it has not been paid.

A. enters upon B.'s land in the fall, claiming the right to sow grain there under a lease, and sows it. B. sues him in a justice's court for such entry, and recovers—afterwards A. gathers the grain and B. sues him for its value. He recovered because the first suit determined that A. had no right to sow the grain but was a trespasser in doing so, though the court in the last suit thought the first erroneously decided. The right was settled in the first suit. (*Brandow* v. *Morss*, lately decided in the court of appeals, but not yet reported.)

These positions are elementary, and need no authority for their support. Mr. Justice Harris, in *Smith* v. *Weeks*, (*supra*,) says: "The good sense and justice of the question are with the Massachusetts cases. The plaintiff had a right to expect that the defendant would perform his duty, and when he came to take judgment for his debt, that he would credit the payment which had been made. To hold that he was bound to appear in the action and employ counsel at his own expense, merely to see that the defendant did what he had agreed to do, would, in my judgment, be unreasonable."

The justice that conflicts with well settled principles of law, settled and declared by enlightened men from broad views of the public welfare, may safely be regarded as of very doubtful character. It is usually the offspring of negligence, and the parent of bad law. It is an old maxim, translated into English, that it is for the interest of the republic that there should be an end to litigation. In the last case cited the plaintiff there, as here, had full opportunity, and was expressly notified by the first suit, to appear and set up his defense, as the plaintiff there claimed to recover the full amount. He chose to think he was not in earnest, or if he were that the plaintiff here could sue and recover it back. He could have appeared and compelled the allowance of the payments at a trifling expense, compared

to the cost of this litigation. In fact the defendant there might have litigated the question at the expense of the plaintiff there, by serving the offer to allow judgment for the proper amount as provided for by the code; or when he found that the plaintiff there had taken judgment for too much, he might have had the judgment opened, and litigated the question upon just terms. The law can not uphold the trust and faith that allow a man to lie by as the plaintiff here did in the first suit, and rest upon the belief that the plaintiff there would not do what in the summons or complaint he had expressly notified this plaintiff he would do, viz. take judgment for the whole amount of the note, and then maintain an action to recover back part of the judgment on the ground that his just confidence had been betrayed. Having, as he knew, a good defense, he thought, of course, that the plaintiff there as an honest man, would recognize it. Such doctrine puts an end to the effect which the wisdom of ages has given to judgments. (3 *Bac. Abr. ed. by Bouvier, title Evidence F. of written evidence*, 568, 569, *and cases cited.*)

If he had been ignorant of the defense, and the plaintiff well knowing its existence, had fraudulently concealed it from him, he could not sustain another action to "rip up" any thing adjudged in the first suit. (*White* v. *Merritt*, 7 *N. Y. Rep.* 352.) It is insisted by the counsel for the plaintiff here that any defense or cause of action that arose after the cause of action in the first suit, might be the basis of an action. No such distinction, I think, can be maintained. A release or discharge of the cause of action on such a ground need not be pleaded, but it might be the subject of a new action. This I think can not be pretended. *White* v. *Merritt*, (*supra*,) I think, is at war with such a position.

The true question is, I think, whether the defense afterwards arising by the act of the parties extinguishes the demand—like payment, accord and satisfaction, release, &c.; or whether it is merely in the nature of a set-off, which never

extinguishes the demand until applied and adjudged by the court. The referee found here that this $100 had been paid on the $350 note. To that extent it extinguished that note the moment it was so paid. The judgment recovered adjudged that note was not extinguished, but was a valid subsisting security for its full amount. That judgment therefore is a bar to this suit.

Nor can I see any ground, irrespective of the assignment, on which this plaintiff could sue for this $100. He never paid it except on the judgment. He never had any contract or privity with this defendant in regard to it. The rye, the thing paid by his principal, belonged to his principal with whom he signed the note as surety. The idea that this defendant made any contract with this plaintiff, was repudiated by his counsel on the reference. The only ground on which he claims a right to maintain the action is that he paid the money on the judgment recovered against him and his principal, and therefore the breach of the contract or of faith between this defendant and this plaintiff's principal enured to this plaintiff's benefit. The court held in *Smith* v. *Weeks*, (26 *Barb.* 463,) that the cause of action accrued the moment judgment was entered in the first suit. If so, it accrued then to the principal, Van Alstyne. (*See Garr* v. *Martin*, 20 *N. Y. Rep.* 306.) As assignee this plaintiff can not succeed, because the referee finds that his assignor was, at the time of the assignment, indebted to the defendant here, in more than the sum assigned. Of course, as assignee, he took the assignment subject to all the equities between the original parties.

The judgment must be reversed and a new trial granted; costs to abide the event.

[Albany General Term, March 7, 1864. *Peckham, Miller* and *Ingalls*, Justices.]

PATRIE *vs.* MURRAY and BUCKLEY.

The 5th section of the act of congress, passed March 3, 1863, (*Statutes of 1862 and 1863, pp.* 756, 757,) so far as it provides for the removal to the circuit court of the United States, of any cause commenced in a state court against any officer &c. for any arrest or imprisonment made &c. by virtue or under color of any authority by or under the president of the United States, or any act of congress, after verdict and a trial and determination of the facts and the law, in the same manner as if the same had been originally commenced in such circuit court, is in violation of the 7th amendment of the constitution of the United States, and is for that reason null and void.

After a verdict has been rendered, and a judgment docketed, in a state court, with no defense under any act of congress interposed, upon the trial, the supreme court is not authorized to direct the removal of the cause to the circuit court of the United States, so as to enable that court to proceed and try the cause over again, the same as if it had been originally commenced therein and no previous trial had been had, or judgment rendered.

THIS action was brought against the defendants for an alleged illegal arrest and imprisonment of the plaintiff. The defendant Murray justified as United States marshal for the southern district of New York, under the "lawful order" of the president of the United States, and the defendant Buckley as his deputy. The offense with which the plaintiff was charged was "discouraging volunteer enlistments" and being engaged in other "disloyal practices against the United States." The plaintiff recovered a verdict for $9000, and costs, and judgment being docketed the defendants sued out a writ of error to remove the cause to the circuit court of the United States, under the 5th section of the act of congress passed March 3, 1863, entitled "An act relating to *habeas corpus*, and regulating judicial proceedings in certain cases."

The defendants, having executed and filed the bond required by law, moved that the bond and sureties be approved, and that no further proceedings be had in the case, &c.

A. J. Parker, *D. K. Olney*, and *J. A. Griswold*, for the plaintiff.

J. Sedgwick, for the defendants.

MILLER, J. The fifth section of the act of congress, passed March 3, 1863, (*Statutes of* 1862 *and* 1863, *pp.* 756, 757,) provides for the removal of any cause commenced in any state court, against any officer, civil or military, or against any other person, for any arrest or imprisonment made &c. during the present rebellion, by virtue or under color of any authority by or under the president of the United States, or any act of congress, to the circuit court of the United States in the district where the suit is pending, under the following circumstances: First. Upon filing a petition stating the facts and duly verified at the time of entering an appearance in such court; or if such appearance shall have been entered before the passage of the act of congress, then at the next session of the court in which such suit or prosecution is pending.

Second. After final judgment, by appeal during the session or term of said court at which such judgment shall have taken place.

Third. Within six months after the rendition of a judgment in any such cause, by writ of error or other process to remove the same to the circuit court of the United States of the district in which the judgment shall have been rendered.

In the last class of cases the act further provides, that "the said circuit court shall thereupon proceed to try and determine the facts and the law in such action, in the same manner as if the same had been there originally commenced, the judgment in such case notwithstanding."

In the present case the cause was tried at the circuit, a verdict rendered in favor of the plaintiff, and a judgment subsequently entered upon that verdict. If this application can be entertained, it must be within the third class of cases

provided for by the act of congress. The question, therefore, presented upon this motion is, whether after a verdict has been rendered and a judgment docketed in a state court, with no defense under any act of congress interposed upon the trial, this court is authorized to direct the removal of the cause to the circuit court of the United States, so as to enable that court to proceed and try the cause over again the same as if it had been originally commenced there, and no previous trial had been had or judgment rendered. In disposing of this question, it is proper to remark that it is not necessary to decide whether the removal of a cause can be had before trial, under the act of congress. Even if the act is valid so far as it provides for a removal in such a case, it by no means follows that it is valid in a case arising after verdict and judgment.

The plaintiff's counsel claims that the fifth section of the act of congress under which the removal is sought is unconstitutional, for two reasons: First. Because it goes beyond the third article of the constitution of the United States, in proposing to give the United States circuit court jurisdiction of a cause in which a case had not arisen under the laws of the United States, for it appeared by affidavits that no question involving the validity of an act of congress had been raised and decided. And secondly. Because to remove the cause to another court and try it *de novo* would be a violation of the seventh amendment of the constitution of the United States.

In reference to the first ground taken, it is insisted by the defendants' counsel that a case has arisen within the provision of the second section of the third article of the constitution under "the laws of the United States;" and that the act complained of by the plaintiff, and to recover damages for which this action was brought, was committed by virtue of the fourth section of the act of congress passed on the 3d of March, 1863, which provides "that any order of the president, or under his authority, made at any time during the

existence of the present rebellion, shall be a defense in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest or imprisonment, made, done, committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of congress; and such defense may be made by special plea, or under the general issue," and that such an action may be removed to the circuit court of the United States.

The principal difficulty in sustaining the first proposition of the plaintiff's counsel arises from the decision of the general term of the first district, in the case of *Jones* v. *Seward*, (26 *How. Pr. Rep.* 433; 17 *Abb. Pr. Rep.* 377,) which is relied upon as an authority for granting the motion now made. It becomes, therefore, important to inquire and ascertain how far that case is similar to the one now considered, and has a bearing upon the question now discussed. That case arose upon an application made to the court at an early stage of the cause, and before trial, to remove the cause to the circuit court of the United States. The motion was denied at special term and upon appeal the order was reversed, a majority of the court holding that the defendant was entitled to have the action removed. There are many marked features which distinguish that case from the one at bar, which it is important to notice. The plaintiff there was a citizen of the state of Iowa, and the defendant a resident of the state of New York. The circuit court of the United States would therefore have original jurisdiction, independent of a case arising under the laws of the United States. Here both parties are citizens of the state of New York. In that case a special order was made, by virtue of which the plaintiff was arrested, while here the defendants only claim to have acted under a general order, and there was no special authority to arrest the plaintiff.

I think, also, that it must be assumed that a clear case was made out in *Jones* v. *Seward*, and that it was fully established, to the entire satisfaction of the court, that the

defense there rested upon the order of the president, and that there was no doubt or dispute as to that fact.

In the case now considered, I think it can scarcely be claimed that a clear case is made out. The defendants' answer sets up two defenses. The first was a general denial. The second alleges that the arrest was made by the lawful order of the president of the United States.

The papers upon this motion show that, upon the trial at the circuit, no question was made by the defendants as to their acting by the authority of the president, or by virtue of any act of congress. No defense of that kind was argued or insisted upon. On the contrary, the action was tried like an ordinary action for an assault and batttery and false imprisonment, upon the general denial, without any special justification. It appears that no claim was made that the act alleged was done by order of the president. No bill of exceptions or case has been served since the trial, and no steps have been taken to review the facts, or any ruling or decision of the judges upon the trial, if any was had adverse to the defendants. Up to the time of this motion, no defense has been actually made of such a character as to bring the case within the provisions of the act of congress.

The affidavits of the defendants show that Robert Murray, the marshal, was by the lawful order of the president of the United States directed to take into custody the plaintiff; that Buckley, the deputy, by the order of the marshal, did execute said lawful order, and take and keep the plaintiff in custody; and that whatever was done by the defendants, or either of them, was so done under an order issued by authority of the president of the United States on the eighth day of August, 1862, authorizing and directing all marshals of the United States "to arrest and imprison any person or persons who might be engaged by act, speech or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practices against the United States."

The defendants' affidavits also state, that before the arrest of the plaintiff they were informed, and believed, and they charge that the plaintiff did, after the making of said order and before he was arrested, discourage volunteer enlistments, and was engaged in other disloyal practices against the United States, for which he was arrested and imprisoned.

The affidavit of the plaintiff denies unqualifiedly that he ever did any act within the spirit and meaning of the order of the president, and positively controverts any allegation of disloyal conduct and practices. With no averment in the answer bringing the plaintiff within the provisions of the order of the president; with no question of that kind upon the trial; this motion can alone be sustained upon the naked affidavit of the defendants, based entirely upon information and belief and expressly contradicted and denied by the plaintiff. Upon the weight of the evidence presented, with the controlling fact of a failure to present any such defense, upon the trial, it is certainly, at least, doubtful whether the moving papers establish a clear case, and whether the fact alleged is not manifestly an issuable one, which must be decided by proof to be adduced upon a trial in court. If such be the case, then I think the motion should be denied.

There is also another view in reference to the case cited, which should be noticed. The learned judge who wrote the prevailing opinion laid great stress, and mainly decided the case, upon the dictum of Chief Justice Marshall in *Osborn* v. *The Bank of the United States*, (19 *Wheat.* 821,) which is as follows: "We perceive no ground on which the proposition can be maintained, that congress is incapable of giving the circuit court original jurisdiction in any case to which the appellate jurisdiction extends." It is claimed that the remark above quoted can only be considered as applicable to the case there presented and determined, which was a suit in which the Bank of the United States was a party, and directly brought in question the validity of an act of congress authorizing such suits to be brought.

In the case of *The People* v. *Murray*, which arose before the court of sessions of the city of New York, upon an application to remove an indictment against Murray for the forcible seizure and confinement of one Arguelles, in violation of the laws of the state of New York against kidnapping, to the circuit court of the United States, Hoffman, recorder, in an able and elaborate opinion, discusses this point, and argues with considerable force that the remarks of Chief Justice Marshall had no application and was not a binding authority. He quotes quite copiously from the learned judge's opinion in the same case to uphold his views, and the court of sessions held that the doctrine cited did not apply to all cases, and denied the motion to remove the indictment. It would seem to be exceedingly difficult, and in fact impossible, for the circuit court to proceed and try an indictment found for the violation of a statute of a state and to pronounce judgment against a prisoner if convicted on trial, with no law of the United States authorizing any such proceeding. The act of congress, however, embraces criminal as well as civil prosecutions, and if it includes the one why should it exclude the other? If this decision is based on sound principles, as I think is quite obvious, it shows that there are exceptions to the doctrine enunciated in *Osborn* v. *The Bank of the United States*. If such an exception applies in the case of Arguelles, should it not be extended to a case arising after trial where no defense was made within the provisions of the act of congress? As no such question was presented in *Jones* v. *Seward*, it is quite probable that the attention of the court was not directed to the point now discussed. When Chief Justice Marshall says that congress is capable of conferring original jurisdiction in all cases in which there might be appellate jurisdiction, he surely does not mean to say that congress can confer such jurisdiction independent of the constitutional provision. He only meant to say, whenever a case arises under a law of the United States, jurisdiction, as well original as appellate, may be conferred; and

that always leaves the question whether a case has arisen to be ascertained for the purpose of deciding the question of jurisdiction. If a "case arises," within the constitution, there would of course be jurisdiction whether it was presented in an original or an appellate form.

The case of *Jones* v. *Seward* differs so materially and in so many respects from the one at bar, as I think has already been shown, that it should not be considered a controlling precedent decisive of the question now presented. And although, were it in point, I should feel bound to yield to it as the decision of a general term, obligatory upon all inferior tribunals, yet as it stands, I do not think it interposes any serious difficulty to an adverse decision of the motion made.

Even if the act of congress is applicable to a case like this, as no question involving the validity of the act was raised or decided, I am inclined to the opinion that the defendants have failed to bring themselves within its provisions so as to justify the court in granting this motion.

I also entertain great doubts whether the courts of the United States can have original jurisdiction of an action, on the ground that it involves the question of the validity of a constitutional provision of an act of congress or a treaty, where it is entirely optional with the defendant to raise the defense or not, as he pleases. I am inclined to think that the act in question was not intended to provide for such a case, but only for those cases where such a question would naturally and necessarily arise. This distinction was not examined or adverted to in *Jones* v. *Seward*.

Can it be said that a case arises until the question is raised? These words have a settled judicial construction.

In *Osborn* v. *The Bank of the United States*, (9 *Wheat.* 819,) the court said: "A case arises, within the meaning of the constitution, whenever any question respecting the constitution, laws or treaties of the United States has assumed such a form that the judicial power is capable of acting upon it." And *Curtis* says, in his commentaries on the constitu-

tion, § 7: "That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form presented by law. It then becomes a case." Certainly the defendants have never submitted to any court the question whether the fifth section of the act of congress aforesaid is valid.

There are some other points urged by the plaintiff in reference to this branch of the case, which it is not essential to consider in the disposition of it, and therefore I do not consider it necessary to examine them.

The second objection taken by the counsel for the plaintiff is, I think, decisive against granting the motion now made. The question now raised has before been presented in the precise shape, and under precisely the same circumstances, which exist in the present case, before the supreme judicial court of the state of Massachusetts, a court which has been eminently distinguished for learning and ability, and whose adjudications have carried with them a weight of authority equal to that of any other court in any state in the Union.

The case to which I refer is that of *Weatherbee* v. *Johnson*, and is reported in 14 *Mass. Rep.* 412. The case cited involved the construction of the last clause of the seventh article of the amendments of the constitution of 1789, which is as follows: "In suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." The action was brought to recover damages for trespasses committed by the defendants in taking and carrying away certain goods and chattels from the possession of the plaintiff. A justification of the act complained of was interposed under a statute of the United States, passed March 3, 1815, entitled "An act further to provide for the collection of duties on imports and tonnage," which imposes certain duties upon the inspector of customs. (4 *Laws of United States*, 838, 840,

841.) A verdict was rendered against the defendants, judgment entered upon that verdict, and no exceptions filed or taken upon the trial. At the same term of the court the defendants filed their claim of an appeal from the judgment to the circuit court of the United States, and it was held by the court that the provision of the act of the congress of the United States, passed March 3, 1815, that after verdict and final judgment in any state court, in an action for any thing done or omitted to be done by the defendant, as an officer of the customs, it shall be lawful for either party to remove and transfer such decision by appeal, to the circuit court of the United States in the same district, is not warranted by the constitution of the United States.

The concluding part of the section of the act referred to was similar to the act of 1863, and contained the same sweeping clause, authorizing the circuit court to proceed and try the law and the facts, in the same manner as if the suit had been there originally commenced, the judgment in such case notwithstanding.

Chief Justice Parker, who delivered the opinion of the court, in discussing the question whether congress had authority by the constitution to enact such a law, employs the following language: "By this provision, the supreme tribunals of a state are considered not only as inferior to the supreme court of the United States—which is not admitted in Virginia—but to the circuit courts, which are by the constitution and laws expressly made inferior courts of the United States; and if it be constitutional congress may authorize appeals to the district courts also; and if they should see fit to establish still inferior tribunals, they may provide for an appeal to, or a writ of error from, such courts however low in the rank of judicial tribunals, giving them authority to reverse and annul the solemn judgments of what are called the supreme tribunals of a state."

The learned chief justice refers to article 3, §§ 1 and 2 of the constiution, and further says: "Taking the constitution,

in this respect, as it was originally formed and adopted, without reference to the amendments ratified before the first judiciary act was passed, we apprehend its true meaning to be, that none but the supreme court of the United States could entertain jurisdiction by way of appeal, from the judgments of the state courts in cases orignally cognizable and commenced in those courts; and that an act of congress giving such jurisdiction to an inferior court of the United States, would have been unconstitutional and void. Indeed such a power was never supposed to exist; for the consequence would have been universally seen to be a prostration of the dignity, and with that the usefulness, of the state tribunals. The constitution would never have been adopted by any one state, under such a construction."

He then proceeds to state that even the appellate jurisdiction of the supreme court of the United States was considered by a majority of the states as an unnecessary, if not a dangerous, interference with the independence of the state tribunals; and as tending to vex and harass the citizen by a multitude of trials, the last of which would be remote from his place of residence, besides infringing on one of the most ancient and cherished principles of the common law, that the trial of facts should be in the vicinage where they happened; and for these reasons the amendment was adopted. After quoting this amendment, (the seventh article before cited,) the learned judge adds: "Since the adoption of this amendment, the *appellate* power, even, of the supreme court of the United States can only be exercised over questions of law appearing of record. For the common law knows nothing of a re-examination of facts, once tried by a jury, except in cases of new trial, which can only be granted by the court before which the trial was had; no such thing as an appeal being known in that system." He then concludes that the provisions of the act of 1815 are not according to the rules of the common law, and can not therefore, by the constitution, be within the power of congress to establish.

In *Parsons* v. *Bedford*, (3 *Peters*, 447, 448,) Justice Story, in commenting upon the seventh amendment to the constitution, says: "This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law, to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias, de novo*, by an appellate court, for some error of law which intervened in the proceedings."

It is urged that the seventh amendment of the constitution only applies to the courts of the United States, and that this distinction was not adverted to in the case of *Wetherbee* v. *Johnson*. It is no doubt true that the state legislature is not restrained from passing laws giving a party a new trial after a verdict, in a manner not in accordance with the course of the common law. But after a verdict has once been rendered, in a state court, congress has no power to say, in violation of the seventh amendment of the constitution, that a new trial may be had in the United States court. It makes no difference in what court the first trial took place, whether in a state or the United States court; the amendment was designed to prevent and to prohibit a second trial in the United States court, after one had previously taken place in any other court. It was intended to protect a party from a second trial being granted by a law of congress, in any and in all cases, where a trial by jury had once before been had. It matters not, then, where the issue of fact was tried by a jury; the prohibition is explicit and emphatic, that it shall not be re-examined in the United States courts otherwise than according to the rules of the common law. Conceding, then, that the seventh amendment is applicable to the United States courts, with what reason can it be claimed that these courts are authorized to try a case over again, because the first trial took place in a state court?

The authorities cited by the defendants upon this point

are only applicable when a question arises whether a state legislature may authorize a second trial in a state court.

Nor do I consider that there is any force in the position that it does not necessarily follow that the circuit court would retry the case. The very object of the statute is to enable the circuit court to proceed to try and determine the facts and the law, the same as if the case had been originally commenced there. It is only for this purpose that a removal can be had under the law of congress, and nothing could be attained by a removal but a re-trial, in a case where no exceptions were taken and no legal questions raised. Even if a distinction could be made between a re-examination of the facts and the law, it is difficult to see how it could be applied to a case where no legal questions were made on the trial or otherwise.

In the light of an authority so plain and so directly in point as that of *Weatherbee* v. *Johnson*, (14 *Mass. Rep.* 412,) involving the very same question which arises upon this motion, and emanating from a tribunal so distinguished, under any circumstances, I should have considerable hesitation in holding a contrary doctrine. In the present case, it must be considered as controlling and decisive. Whatever may be said in reference to *Jones* v. *Seward*, as a binding precedent in a similar case, it must be borne in mind that no such question could arise in that case, and it did not require the examination of the point now discussed.

Upon principle it would be a remarkable and extraordinary proceeding, if a cause could be removed after trial and judgment, without regard to the action of the court before whom the cause was tried; with no error alleged; with no ground urged on the trial to indicate that any question had arisen which rendered it necessary, legal or proper that another tribunal (and that tribunal of no higher grade than the court which had original jurisdiction) should take cognizance of it and proceed to its trial, without reference to what had previously taken place. It is certainly a grave

question, even if, under any circumstances, the law sanctions such a disposition of a case, and whether a party should be permitted to remain quiet, without presenting a supposed defense which may be claimed to exist; thus sleeping upon his right, and afterwards insist that the cause be removed and a new trial be had. In justice, if the defendants were entitled to the benefit of the provision of the act of congress which has been cited, should they not have claimed it the very first opportunity, at the time of entering their appearance, or at the next session of the court after the passage of the act of congress, as therein provided? Surely, it is adding greatly to the burthens of litigation to allow the plaintiff to incur large expenses and additional costs by bringing his cause to a final and successful issue, and then to deprive him of the fruits of the result by imposing upon him the necessity of incurring the inconvenience, hazard and expenses of another trial at a distance from his home, without any remuneration or re-payment for the expenses already incurred. I think it should be made to appear very clearly and satisfactorily at least, in such a case, that a defense existed and had previously been presented, even if such a proceeding is to be tolerated under the provision of the act of congress.

The right of trial by jury is one of the greatest and most inestimable privileges secured and guarantied by the constitution and the laws of the land; and when such a trial has once been had and enjoyed, it should not be diregarded, but for strong and controlling reasons. Where a cause has once been fairly submitted to the consideration of an impartial jury, and the facts passed upon without prejudice or passion and with a due and proper regard to law and just principles, the verdict and proceedings should only be set aside for good and sufficient cause known to the law.

While, then, we should bow to the mandates of the law and at all times and on all occasions uphold the statutes passed by Congress to preserve and maintain the public peace and tranquility, we should at the same time carefully guard

and protect private rights and personal security against laws which plainly violate the solemn enactments of the constitution. This is a duty imposed upon all courts, under all circumstances.

My opinion is that the fifth section of the act of congress, so far as it authorizes a removal of a cause after verdict, and a trial and determination of the facts and the law in the same manner as if the same had been originally commenced in the circuit court of the United States, is in violation of the seventh amendment of the constitution of the United States, and is for that reason null and void.

The motion must be denied, with costs.

[Albany Special Term, July 28, 1864. *Miller*, Justice.]

N. B. An appeal was taken by the defendants from the decision of the special term denying the defendants' application, and was heard at a general term of the supreme court held at the city of Albany on the first Monday of December, 1864, before Peckham, Miller and Ingalls, Justices, when the order of the special term was affirmed.

Lord & Austin *vs.* Ostrander.

The erroneous dismissal of a suit by a justice of the peace, against the remonstrance of the plaintiff, puts an end to it, as effectually as though it was dismissed upon the plaintiff's motion

An appeal from the judgment of dismissal will not restore the action, so as to allow the plaintiff to interpose its pendency as a bar to a suit subsequently commenced by the defendant to recover a demand which he was required to avail himsef of as a set-off against the demand of the plaintiff before the justice.

Where, however, the county court upon a reversal of the judgment may award a new trial, either before the justice or in the county court, the

suit, *it seems*, is not determined pending an appeal to the county court, as to any matter in issue, or which is required to be put in issue in such action.

THE complaint alleged that the defendant owed the plaintiffs $90.30 with interest from the 28th day of December, 1860, on an account for goods sold and delivered to him, and for moneys paid out by them at the defendant's request. The answer, among other things, alleged that before the commencement of this action, the defendant sued the plaintiffs before a justice of the peace, in an action on contract, wherein the claim of the plaintiffs might, could and ought to have been set off against the claim of this defendant, and that the suit is still pending and undetermined. The issue was referred, and upon the trial before the referee, he found that the action was commenced on this same day, but after the service of the summons upon these plaintiffs to appear before the justice. That upon the return day of the summons the parties appeared before the justice, and this defendant declared in assumpsit; but the plaintiffs, instead of joining issue, made affidavit showing the commencement of this suit by them against the defendant. And thereupon the cause before the justice was adjourned. Upon the adjourned day the justice, against the remonstrance of the (then) plaintiff, entered a judgment dismissing the action with costs; and judgment of discontinuance was rendered before answer in this action. An appeal was taken from the said judgment to the county court, and is still pending. The referee overruled the defense and ordered judgment for the plaintiffs. To which the defendant excepted. Judgment having been entered up in pursuance of the report, the defendant appealed to this court.

Jas. F. Starbuck, for the appellant.

L. H. Brown, for the respondents.

By the Court, MORGAN, J. Under the provisions of the revised statutes relating to pleading and set-offs in justices' courts, the plaintiffs, who were first sued by the defendant before a justice of the peace, were required to plead or give notice of their claim in this action and avail themselves of it before the justice, or be forever precluded from maintaining any action to recover the same, or any part thereof. (2 *R. S.* 233, 236, § 57.) The pendency of the suit before the justice would therefore be a bar to this action. (*Douglas* v. *Hoag*, 1 *John.* 283. *Townsend* v. *Chase*, 1 *Cowen*, 115.) But its effect as a bar would be obviated by the discontinuance of the prior action before answer in this action. (10 *How. P. R.* 85. *S. C.* 10 *N. Y. Rep.* 500.) It is however claimed by the appellants' counsel that the erroneous dismissal of the suit before the justice against the remonstrance of this defendant is not equivalent to a voluntary discontinuance of the action by him. It certainly puts an end to the suit, as effectually as though it was dismissed upon the respondent's motion, so that it is no longer pending, unless it is kept alive by the defendant's appeal to the county court, from the judgment of dismissal.

But it is obvious that the original action, although erroneously dismissed by the justice, can not be restored. If the county court should reverse the judgment, the suit is no longer available for any purpose whatever, either to sustain a demand or to defeat a set-off. The county court has no jurisdiction to award a new trial, in which the plaintiffs here could avail themselves of their set-off. If, however, it was a case where the county court could award a new trial, either before the justice, or in the appellate court, there are substantial grounds upon which it could be argued that the original action, notwithstanding its dismissal by the justice, was still pending as to any matter in issue or which is required to be put in issue in such action. But this is not such a case. The defendant's action before the justice is forever gone, and is no longer available as a bar to a new action

commenced against him by the plaintiffs. This was the opinion of the learned referee, and I think he was right, and that the judgment should be affirmed.

Judgment affirmed.

[Onondaga General Term, October 4, 1864. *Morgan*, *Bacon* and *Foster*, Justices.]

E. F. Armstrong *vs.* H. B. Cushney.

C. owed J. A. upon an account, and gave his note for a part of it, promising to pay the balance within a specified time. J. A. subsequently transferred the whole account, together with the note, to the plaintiff, by parol. *Held* that the delivery and acceptance of the note were some evidence of the demand, sufficient to make the transfer good as between the parties, although the consideration amounted to fifty dollars.

But that it would not be assumed, without proof, that the consideration amounted to that sum.

Since the code of procedure, the assignee in such a case, has his election to sue in his own name, upon the note, or upon the original indebtedness. And when he sues upon the original demand, it is sufficient for him to produce and surrender the note upon the trial.

Where, however, there is a transfer of the note without a contemporaneous transfer of the account for which the note is given, the account, *it seems*, is extinguished.

MOTION for a new trial upon exceptions ordered to be heard in the first instance at a general term. The plaintiff, as assignee of her son Joseph S. Armstrong, claimed to recover the balance of an account for goods sold and delivered to the defendants. The complaint alleged that Joseph S. Armstrong, for value received, sold and assigned the demand to the plaintiff. The defendant in his answer alleges that on the 20th day of April, 1862, he settled the demand by giving his note to Joseph S. Armstrong for $100, payable six months after date, which note is still outstanding and unpaid.

On the trial Joseph S. Armstrong testified that he drew off the account and presented it to the defendant, and the defendant gave his note for $100 with interest at six months, and agreed to send him the money for the balance, $44.54, within thirty days. He further testified that the note was not taken in full payment of the account, and that the next day after taking it he assigned the note and account to the plaintiff. That there was no written transfer, but the same was delivered to him. The plaintiff was about to testify as to the consideration of the assignment, when he was stopped by the judge, and the question was overruled, upon the ground that the *bona fides* of the assignment had not been impeached. To this decision the plaintiff's counsel excepted. The plaintiff thereupon tendered and offered to surrender the note and rested. No evidence was introduced by the defendant. The defendant moved the court to nonsuit the plaintiff, because, (1.) The assignment was not in writing; (2.) Because there was a special agreement, and the action should have been for breach of it; and (3.) Because the note not being negotiable could not be surrendered, or if it could be, it should have been surrendered before the action was commenced. The motion was granted, to which decision the plaintiff's counsel excepted.

Geo. F. Bicknell, for the plaintiff.

H. B. Cushney, defendant, in person.

By the Court, MORGAN, J. I will examine these objections in the order in which they are presented by the defendant. And *first*, as to the necessity of a written assignment of the demand in question. No authority is cited to sustain this objection. The demand was doubtless a "chose in action," within the meaning of the statute of frauds. (2 *R. S.* 136, § 3.) Here there was a delivery and acceptance of the note, which was some evidence of the demand, and this

would make the sale and transfer good, even as between the parties to it. (*Id.* § 3, *sub.* 2.) It does not, however, appear that the consideration amounted to fifty dollars, nor but that the plaintiff at that time paid some portion of it. (*Id.* § 3, *sub.* 3.) Perhaps if the judge had allowed the question to be answered, as to "what was the consideration of the assignment," it would have appeared that it did not amount to fifty dollars. The question having been objected to by the defendant, it will not be assumed that the answer would have aided him in disproving the validity of the transfer.

The two next objections may be considered together, and they present the question, whether since the code authorizing the assignee and owner of a demand to prosecute for it in his own name, the present plaintiff can surrender the note given for a portion of the account and sue the defendant for the original demand. Formerly there would have been a technical difficulty in his way, as the action must have been brought in the name of the assignor. As the law was before the code, if the note had been negotiable, the plaintiff might have sued upon that, but not upon the original account, although formally assigned to him. But since the code I do not see any objection to a suit in the name of the assignee, for the original demand, provided it is assigned to him contemporaneously with the note. When, however, there is a transfer of the note without a transfer of the account for which it is given, the account, it seems, is extinguished. And it seems the transfer of the note merely does not transfer an interest in the account, so as to entitle the assignee to sue upon it. (*Battle* v. *Coit*, 19 *Barb.* 68.)

The evidence given upon the trial, and which was uncontradicted, would I think have authorized the jury to find as a matter of fact, that the assignment was of both the note and the original account. It was assumed upon the motion for a nonsuit that the note was not negotiable. Hence by the law as it existed before the code, the suit upon the note as well as upon the account must have been in the name of

the assignor. In such a suit I see no reason why the plaintiff could not maintain an action upon the original account by surrendering the note upon the trial. And when the original account is assigned with the note, there is no reason now why the suit may not be maintained, with the same effect, by the assignee.

It is also competent for the original parties to separate the account into two items of indebtedness, and the giving of the note for a portion of it, under the circumstances detailed in the evidence, did not interfere with the collection of the balance. If the assignor had not transferred the demand, it is apparent that after the note fell due he might have maintained a suit upon the original account, by producing the note on the trial, to be canceled. As the evidence in this case would have authorized the jury to find that the note and account never belonged to different parties, but that the account for which the note was given was assigned to the plaintiff with the note, I am of opinion that it was competent for the assignee to sue the account, and that he might recover in this action by producing and cancelling the note upon the trial.

After all, the objection is one of form, for if the plaintiff could not recover so much of the account as the note covered, he could have sued upon the note in one count, and for the balance of the indebtedness in another count. Upon the hypothesis that the assignment was of the whole account as well as of the note, the action was well brought, and the objections of the defendant should have been overruled.

There is nothing in the claim made by the defendant that the note should have been delivered up before the commencement of the action. That is only required when the suit proceeds upon the basis of a rescission of the contract. The giving of the note was not a payment of the account; nor did its transfer to the plaintiff operate as payment, being negotiated together, to the same party by the same act. It has been too often decided in this state to require the cita-

tion of authorities, that the simple note or promise of the debtor is not a payment of a precedent debt. While the note remains in the hands of the original creditor it merely suspends the remedy on the original demand until its maturity; and then the creditor has his election to sue upon the note or upon the original indebtedness. And when he sues upon the original demand it is sufficient for him to produce and surrender the note upon the trial.

I am opinion, therefore, that a new trial should be granted, costs to abide the event.

Ordered accordingly.

[Onondaga General Term, October 4, 1864. *Morgan, Bacon* and *Foster*, Justices.]

Brown *vs.* McIntyre.

43 341
14h 464
26h 576

Where a creditor, having a lawful claim against his debtor for less than $4200, commenced a suit against him, in Canada, and upon an affidavit stating that the defendant was justly indebted to him in the sum of $6000, (which affidavit could not by the laws of Canada be controverted,) caused a capias to be issued, upon which the defendant was arrested and held to bail in the sum of $6000, and being unable to procure bail to that amount he was imprisoned for about eighteen months; *Held* that an action for malicious prosecution would lie.

THE plaintiff in this action claims to recover damages sustained by him in consequence of a malicious prosecution of him by the defendant in the court of common pleas in Kent county, Canada. On or about the 2d of December, 1857, the defendant commenced a suit against the plaintiff by capias, on which he was arrested and confined in jail in Kent county in Canada, for the period of about eighteen months. The capias was issued upon an affidavit made by the defendant, stating that the plaintiff was justly indebted to him in the sum of $6000, when in fact the entire indebt-

edness due from the plaintiff to the defendant was between $4100 and $4200. By the laws of Canada the affidavit made by the defendant could not be controverted, but the capias issued of course upon it for the amount sworn to, when the arrest was made. The only mode in which the party arrested could secure his discharge, was by giving bail to the sheriff, conditioned that he would put in special bail in the action according to the practice of the court. The plaintiff insisted that the defendant held him to bail for the excess over and above the real debt, maliciously, and for the purpose of preventing him from obtaining bail. Upon the trial of the cause in the court of common pleas, on the 22d of April, 1858, the plaintiff in that action recovered a verdict for $4187. And under a statute existing in Canada, the defendant recovered his costs for defending the action, which were afterwards deducted from the amount of the verdict.

The issue in this cause was referred to a referee, and upon the trial before him, he found in favor of the plaintiff for $3000 damages. From the judgment entered upon that report, the defendant appealed.

A. P. Nichols, for the appellant.

P. G. Parke, for the respondent.

By the Court, DANIELS, J. There was a difference of very near $2000 between the debt due to the defendant, and the amount stated in his affidavit upon which the capias was issued and the plaintiff was arrested and imprisoned. When the action was tried in the court of common pleas in Canada, all that the defendant claimed was the amount he recovered by the verdict which the jury rendered. At the time of the arrest the defendant held two demands against the plaintiff not due, amounting in the aggregate, to $650. That, together with the amount of the verdict, comprised all the

demands which the defendant held against the plaintiff. The officer who made the arrest upon the capias testified that he inquired of the defendant at the time he received the process, whether the plaintiff owed him the amount for which it had been issued. To which the defendant replied, "No, I don't know that he does, but I must fix it so that he can't get bail." This statement was contradicted by the defendant, who was sworn as a witness on his own behalf. But it was found to be true by the referee, as it very well might be, since the probability of its being so, was to some extent indicated by the manner in which the defendant's affidavit had overstated the amount of his debt.

Assuming this finding to be correct, as it most probably is, the question then arises whether it is sufficient to enable the plaintiff to maintain this action. The verdict rendered by the jury, and the judgment entered upon it, which were proved and read upon the trial of this cause, conclusively establish that to the extent of the recovery, the defendant had a good cause of action against the plaintiff. And under the laws of Canada, he was legally correct in making the arrest and procuring the plaintiff's imprisonment. But beyond that amount, the judgment is just as conclusive, that the defendant had no legal or probable cause for arresting and imprisoning the plaintiff. So far as the arrest and imprisonment was made for a sum exceeding the amount recovered, it was made without any real foundation whatever. If one man having a just claim against another, may maliciously arrest and imprison him for a much larger debt—so much larger, as to preclude the debtor from obtaining bail—and still be subject to no legal liability for the injury thus occasioned, then the law is very deficient in the protection afforded by it to the rights of persons. If a cause of action for $4000 will excuse the wrong perpetrated by an arrest for $6000, it will equally excuse it, if the arrest be for $60,000, or any other amount that the depravity or vindictiveness of the plaintiff would permit him to swear to. An instrument

of greater legal oppression and cruelty can not well be imagined. A rule like that would be dangerous to the security and rights of every person that under any circumstances might fall within the power of another.

In order to sustain an action for malicious prosecution, the law requires that the proceedings which form the subject of complaint should have been maliciously instituted, and carried on, without any reasonable or probable cause. There would ordinarily be but little difference in the injury produced to the defendant, whether the unfounded prosecution was carried on without any demand whatever to justify it, or whether it was coupled with a claim of real merit. So far as that part of the prosecution is considered, it is as wholly deprived of reasonable or probable cause as it would be when made itself the sole subject of the suit. And when that is found to be the case, and actual injury is produced, and damage sustained in consequence of it, a proper subject for redress would seem to be presented to a court of justice. The case to that extent is certainly within the reason and equally within the necessity of the rule, intended to afford protection to the person against unfounded and malicious prosecutions.

This conclusion does not stand merely upon principle. It is sustained by the authorities, though without any direct adoption of them by the courts of this state. Phillipps says: "Where there have been mutual dealings between the plaintiff and defendant, and items are ascertained to be due on each side of the account, an arrest for the amount of one side of the account, without deducting what is due on the other, is malicious and without probable cause." (3 *Phil. on Ev.*, 3*d ed.* 261.) This principle is fully sustained in the following English cases: *Austin* v. *Debnam*, 3 *Barn. & Cress.* 139; *Dronfield* v. *Archer*, 5 *Barn. & A.* 313; 7 *Eng. Com. Law.* 177; *De Medina* v. *Grove*, 1 *Queen's Bench Rep.* 152; *affirmed on error*, 172; *Churchill* v. *Siggers*, 26 *Eng. L. and Eq. R.* 200. The last case was very carefully exam-

ined in view of the previous authorities, and the conclusion was definitely reached that an action upon the state of facts existing in this cause should be sustained.

Upon a principle very analogous, the supreme court of Pennsylvania have held that an action may be maintained for levying an execution for the amount of the penalty of a bond on which a judgment was recovered, instead of the amount of the condition. (*Sommer* v. *Wilt*, 4 *Serg. & R.* 19.) And for a maliciously excessive distress made by the defendant. (*O'Donnell* v. *Seybert*, 13 *id.* 54.) These actions were regarded as falling within the principle maintained in the authorities previously referred to. And they, as well as the examination of the question upon principle, lead to the result that so far as this point is involved the present action should be sustained. The application of the remedy may be more difficult than it would be in ordinary cases, but that would be a very bad reason for denying it altogether.

The next objection urged against the right of the plaintiff to redress arises under a statute of Canada. By this statute it is enacted, that whenever one person may by affidavit hold another to bail for a greater amount than he shall recover a verdict for, he "shall recover no costs of suit, but the defendant shall be allowed to deduct his taxed costs from the amount of the verdict." The only benefit which the plaintiff could, or did, derive, under this provision of the statute, was the recovery and deduction from the verdict of his costs of defending the action brought against him. The defense was necessarily made, because the defendant would otherwise most likely have recovered upon default all he claimed in the capias and declaration. And if that had been done, the judgment would have afforded him ample protection for the imprisonment of the plaintiff. It would have legalized the injury which is now complained of. The plaintiff had no other means of vindicating and preserving his right to seek redress for the injury to which he was subjected by the

arrest. If the recovery, and deduction of the costs from the verdict, which was only a means of satisfying them, can have the effect of defeating the right of action in this case, the same reason would exist for maintaining the same result where the verdict was general for the defendant; for in that case the defendant would recover, and be entitled to satisfaction of his costs. Under the application of such a principle it would be difficult to imagine a combination of circumstances that would warrant an action for malicious prosecution, unless it grew out of criminal proceedings. The design and object of this enactment was not to secure redress for the injury occasioned by an unfounded and malicious arrest of the party for a greater sum than was owing; for it includes and treats all cases alike, whether the arrest, for the greater sum, be the consequence of inadvertence or design. The object seems to have been to secure the observance of care and caution, through which the party arrested would be protected against the ordinary consequences of hurry and mistake. Under no fair construction of its provisions does this statute interpose any obstacle in the way of the present action.

There is greater difficulty in sustaining the conclusions of the referee upon the subject of damages; for they are allowed to compensate the plaintiff for all the injuries sustained by him from his entire imprisonment, extending through a period of near eighteen months. To justify this conclusion the referee finds, as a fact, that the plaintiff could have procured his discharge on bail if the affidavit, and the capias issued upon it, had correctly stated the amount due from him to the defendant; and that he was unable to procure bail for the amount for which the arrest was made. If that view of the evidence be correct, then all the damages produced by the imprisonment were the legitimate consequence of the act complained of, and the plaintiff is entitled to recover them in this action. The officer who arrested the plaintiff testifies

that there were but a few persons in the county whom he would accept as bail for so large a sum as six thousand dollars, and none of these are shown to be either friends or acquaintances of the plaintiff. His home was in Rochester, and although his business seems to have been considerably extended in Canada, there is nothing in the case from which it can be inferred that he enjoyed any uncommon means of securing bail in case of an arrest, for a large demand. The evidence of the officer is that he called on several persons to become bail for the plaintiff's discharge. But while they were willing to do so for four thousand dollars, or any smaller amount, they were not qualified as bail for so large a sum as six thousand dollars. Although the officer does not expressly say that he would have accepted these persons as bail for forty-one hundred and fifty dollars, which was about the amount of the actual demand due to the defendant at that time, it may, not unreasonably, be inferred, from his conduct and manner of testifying, that he would. Besides the statement of the defendant, that he must make the demand so large as to prevent the plaintiff from procuring bail, substantially concedes his ability to do it for the debt actually due. This evidence, considered together with that showing the extent of the plaintiff's business and the amount of property employed in it, seem to be sufficient to justify the conclusions of the referee in this respect.

The circumstance of other arrests being afterwards made does not necessarily affect the question of the defendant's liability. They were probably induced by the proceedings which he had previously taken. But whether they were, or not, is of no importance; for they were all for small amounts compared with the demand which the defendant has made. And if the plaintiff could secure his discharge on bail for the sum of four thousand dollars and upwards, there is no reason for supposing he could not do so where the arrests were for smaller amounts. His ability to do that is neces-

sarily included in the finding of the referee, that the imprisonment was owing to the arrest made at the instance of the defendant.

The judgment should be affirmed.

[Erie General Term, November 21, 1864. *Davis, Grover* and *Daniels*, Justices.]

Post and Dowding *vs.* The Ætna Insurance Company.

Where an agreement is made by the agent of an insurance company, for the renewal of a policy, nothing being said respecting the amount to be charged, the insured has a right to suppose the renewal is to be at the rate formerly paid.

Where an insurance agent is authorized under the previous dealings between him and the insured to charge the premium on a renewal, in account, or to resort to an implied agreement for its payment, he may make a renewal on the implied promise to pay, as well as upon actual payment of the premium; notwithstanding a provision in the policy that no insurance shall be considered binding until the actual payment of the premium.

Although a policy, and the certificates of renewal, declare that they shall not be valid until countersigned by the agent, this will not exclude the power of the agent to bind the insurers by a parol agreement to renew.

So far as the exercise of his authority as agent is involved, it makes no difference that at the time of renewing a policy the period for which the policy was issued had expired.

The possession and use, by an agent, of an insurance company's certificates of renewal, together with the exercise of that authority in other instances, indicate that the power of renewing and continuing insurances has been conferred upon such agent.

If there is nothing in the case showing the agent to be confined or restricted, in the use of that authority, to cases where the policy renewed is still valid as an insurance, those who deal with him are authorized to presume that no such restriction or qualification exists.

Where an individual is authorized to accept risks, to agree upon and settle the terms of insurance, and to carry them into effect by issuing and renewing policies, on behalf of an insurance company, this is sufficient to constitute him a general agent for the company, at the place where his business as such agent is transacted; and he can as well exercise his authority of renewing and continuing a policy which has already expired, as by making and issuing a new one.

Post *v.* Ætna Insurance Company.

An agreement by parol to renew a policy does not, of itself, renew the insurance. But it imposes upon the agent the duty of doing whatever is necessary to effect a renewal of it.

An agreement of that nature, either express or implied, must necessarily precede the renewal of any insurance. A similar one must be made, to ascertain and determine the subject, term and rate of insurance, in all cases where policies are issued.

They are directly and necessarily within the employment and authority of the agent, whose business could not be carried on without the power to enter into them. And the law does not require them to be in writing, in order to become obligatory on the parties.

Under the common law, a promise, for a valuable consideration, to make a policy of insurance, is no more required to be in writing than a promise to execute and deliver a bond, bill of exchange or negotiable note; and such is the general doctrine of the law, when no statutory enactment requires the coutract to be in writing, to render it valid.

Where a parol agreement is made, by an agent, to renew a policy, the action should be in equity for its specific performance, or at law for the breach occasioned by the failure to renew the insurance. Either form can be adopted, with equal propriety.

Where the action is for a specific peformance, the court considers the agreement which the party was under a legal obligation to make, the same as if made, and decrees the payment of the money which would have been payable under the consummated agreement.

Where the action is at law, for the damages arising out of the breach of the agreement, the relief obtained is the same.

Where service of notice and proof of loss are by the terms of the policy a condition precedent to the insurer's liability, such condition is not affected, in legal contemplation, by the fact that its non-performance was unproductive of injury.

Such a condition may be partially or wholly waived by the insurers. Such waiver may be express, or it may be inferred from circumstances.

Mere defects in the proofs served have often been held waived by an omission to insist specifically upon them, when it was in the power of the party to correct and supply the defects. *Per* DANIELS, J.

If the underwriter intends to insist upon defects in the proof, he must notify the insured of that intention in time to afford him an opportunity to correct them.

Conditions precedent are waived by such conduct on the part of the party entitled to insist upon them as is inconsistent with the purpose to require the performance of them. And contracts of insurance constitute no exception to the rule.

Thus where the objection to paying a claim under a policy was not that the proofs were not served, but that there was no legal liability on the part of the underwriters, for the payment of the loss, their agent insisting that

the policy had not been renewed, and that no agreement for its renewal had been entered into; that insurance companies were not benevolent societies, &c.; *Held* that if the insurers had intended to resist payment on account of the failure to serve the preliminary proofs, the agent should have so informed the insured; it being still in time to make the proofs; and that failing to do so, he must be deemed to have waived any defect in the proofs.

Where the object of a release, executed by the insured and indorsed upon the back of the policy on settling the same with the company, seems to have been to secure merely the discharge of the debt mentioned in the release, and the surrender and cancellation of the policy creating it, and nothing beyond that, the general terms employed should be limited to that object, and not be so construed as to extend the release to claims arising under other policies.

THIS action was brought upon a policy of insurance issued by the defendant, by which it insured the plaintiff against loss and damage by fire, to the amount of one thousand dollars, upon their stock of flour, mill-feed and grain, contained in a mill occupied by them, near Attica in Wyoming county. The mill, with all its contents, was destroyed by fire on the 19th of April, 1863. The defendant had issued three other policies of insurance to the plaintiffs, in part upon the mill, and the residue upon the stock. One of those policies had been twice renewed, by certificates for that purpose attached to the policy. The policies and certificates were all issued by the defendant's agent at Attica, and each contained a statement that it was not valid until countersigned by such agent. On the 23d of April, 1863, proofs of loss were made and served under all the policies except the one in suit. The defendant claimed that the policy in suit had expired before the fire, and that it was not liable under it. The defendant, on the 23d of April, 1863, paid the losses arising upon the other policies and took a release upon each of them. Each release was in substance the same, and contained a statement that the amount received was in full satisfaction of all loss or damage occasioned by the fire which occurred on the 18th of April, 1863,

and said written policy was thereby surrendered and can celed. On the 1st of July, following, proofs of loss were served on account of the policy in question. The plaintiffs gave evidence tending to prove a verbal agreement to renew the policy in question for the period of sixty days, which included the time when the loss occurred. The defendant claimed, and insisted, that the evidence was too indefinite to establish an agreement to renew the policy; that it could only be renewed by an instrument in writing; and that the agreement, if made, was not binding on the defendant. Also that it was discharged from payment of the loss in question by delay in serving the proofs of loss, and by releases given on the other policies. The court submitted the evidence tending to prove the agreement to renew the policy to the jury, and overruled the other objections of the defendant; to which it duly excepted. The jury found for the plaintiffs for the amount of the policy, and judgment was stayed until the decision of the general term upon the exceptions taken.

John Ganson, for the appellant. There are three questions presented in this case, on this appeal. The first is, whether the plaintiffs have complied with that condition in the policy which requires that "all persons having a *claim* under a policy shall give *immediate notice thereof*, and render a particular account *thereof*, with an affidavit stating the time and circumstances of the fire, &c." The second is, whether a release executed on the 23d of April, 1863, did not discharge the claim, if any existed. The third question is, whether the agent had authority to make a valid parol agreement of extension. As to the first point, the facts are as follows: The fire occurred on the night of the 18th of April, 1863. The claim was made under the policy in question on the 1st day of July, 1863, being seventy-three days after the loss occurred. The plaintiffs both swear that they did not learn 'till two or three weeks after the fire that they had a claim under the policy in question; that was about

the first of May. They allowed two months to elapse after that before they made a claim. The defendant had a prior policy of insurance on the same stock, of one thousand dollars, under which they made a claim immediately. This claim was paid on the 23d of April, 1863, five days after the fire occurred. The plaintiffs then signed a release, under seal, in these words:

"Received from the Ætna Insurance Company, of Hartford, Connecticut, through E. J. Basset, general agent, one thousand dollars, less interest, the same being in full satisfaction of all loss or damage by fire which occurred on the 18th of April, 1863, and said within policy 603 is hereby surrendered and canceled.

In testimony whereof we have hereunto set our hands and seals this 23d day of April, 1863, at Attica, N. Y.

In presence of } DANIEL POST, [L. S.]
C. B. Benedict. } F. C. DOWDING. [L. S.]"

I. The plaintiffs were required, by the policy in question, if they had any *claim* under it to give immediate notice *thereof*, and render a particular account of such claim, with an affidavit.

II. They permitted seventy-three days to elapse before they gave notice to the defendant of their *claim*, and before they served an affidavit giving an account of it.

III. No sufficient excuse is shown for the delay. The plaintiffs testify that they advised with counsel within two or three weeks after the fire occurred, and they permitted two months to elapse after that before they made any claim of the defendant. 1. Where a policy required "immediate notice of *loss*," and the notice was not given until *eleven* days after the fire, no sufficient excuse being shown for the delay, it was held, in Pennsylvania, to be too late, and not a compliance with the policy. (*Trask* v. *State Fire and Marine Ins. Co.*, 29 *Penn. Rep.* 198.) The declaration, in an action on a policy of insurance, alleged that the buildings insured

had been consumed on the 23d of February, 1837, and that the assured gave notice thereof to the company on the 2d of April following. The court held, on demurrer, that this was not a compliance with the condition of the policy requiring notice of the loss to be given forthwith. That "forthwith" meant immediately, without delay. That a notice given thirty-eight days after the fire was neither a literal, nor a substantial compliance with the condition. (*Inman* v. *Western Fire Ins. Co.*, 12 *Wend.* 452.) Where a policy provided "that persons sustaining loss or damage by fire shall forthwith give notice thereof, in writing, to the company, &c.," it was held in equity, that a neglect to give notice of a loss, until more than four months afterwards, was fatal to the claim. (*McEvers* v. *Lawrence*, 1 *Hoff.* 171.) 2. This provision is a condition precedent to the right of recovery, and a compliance with it must be averred and proven. (*Mason* v. *Harvey*, 20 *Law and Eq. Rep.* 541. *Inman* v. *Western Fire Ins. Co.*, *supra.*) 3. There being no dispute as to the facts, the point made presents a question of law. This is so where the requirement is to give notice with "reasonable diligence." (*Mellen* v. *The Hamilton Fire Ins. Co.*, 17 *N. Y. Rep.* 609.) 4. The plaintiffs had another policy of insurance issued by the defendant, on the identical stock mentioned in the policy in question. The general agent of the defendant came to them to adjust the loss and damage they had sustained on that stock by the fire. The plaintiffs, under seal, *agreed* to receive one thousand dollars, less the interest, "in full satisfaction of *all loss* or *damage* sustained by them on the stock by the fire." This was after the dispute between the plaintiffs and Mr. Benedict as to any renewal of the policy in question, and after Mr. Benedict referred Mr. Post "to Mr. Bassett as the general agent who had the control of the entire matter." The release, under these circumstances, is conclusive between these parties, and can not be explained or controlled by oral evidence. (*Piersons* v. *Hooker*, 3 *John.* 68. *Vedder* v

Vedder, 1 *Denio*, 257. *Palmerton* v. *Huxford*, 4 *id.* 166. *Egleston* v. *Knickerbacker*, 6 *Barb.* 458.) 5. The court erred in deciding that the agent could renew the policy in question by an oral agreement. The policy itself is in writing, and declares, on its face, that it "*shall not be valid until countersigned by the duly authorized agent of the company at Attica.*" The certificates of renewal declare that they are "*not valid unless countersigned by C. B. Benedict.*" The forms are furnished by the defendant, signed by the president and secretary, and give notice to the party taking the insurance what is requisite to make the agreement valid. The plaintiffs, as holders of policies and of certificates of insurance, had notice of this limitation and requirement. (*Spitzer* v. *St. Marks Ins. Co.*, 6 *Duer*, 6.) The question is as to the authority of the agent to make a parol extension, and not as to the power of the defendant to make a valid parol agreement to insure.

B. H. Williams and *A. P. Nichols*, for the respondent. I. A parol contract to renew a policy of insurance is valid. (*See Trustees of First Baptist Church* v. *Brooklyn Fire Ins. Co.*, 19 *N. Y. Rep.* 305; *Com. Mut. Ins. Co.* v. *Union Mut. Ins. Co.*, 19 *How.* [*U. S. Sup. Ct.*] 319; *McCullough* v. *Eagle Ins. Co.*, 1 *Pick.* 280; *Hamilton* v. *Lycoming Ins. Co.*, 5 *Barr*, 342; *Delaware Ins. Co.* v. *Hogan*, 2 *Wash. C. C. R.* 4; *Perkins* v. *Washington Ins. Co.*, 4 *Cowen*, 645; *Constant* v. *Alleghany Ins. Co.*, 3 *Wallace, jr., reported in Am. Law Reg. vol. I, N. S.* 116.) The testimony clearly shows a parol agreement to renew the policy of insurance, and a parol renewal of the same, and abundantly sustains the finding of the jury that the policy in question was renewed.

II. The plaintiffs gave immediate notice of their claim to Benedict, who was agent for the company at Attica, and to Basset, who was the general agent of the defendant. The defendant was a foreign corporation and represented at Attica

by Benedict, and, so far as the payment of claims was concerned, by Bassett, and the jury have found that notice to Benedict and Bassett was notice to the defendant. (*See Sexton* v. *Montgomery Mut. Ins. Co.*, 9 *Barb.* 191.)

III. The defendant, immediately after the fire, denied that the policy of insurance was in force, and refused to pay the claim in question on the ground that the policy was never renewed. By taking this position they waived service of notice of loss and of proofs of loss. (*See Francis* v. *Ocean Ins. Co.*, 6 *Cowen*, 404; *Boynton* v. *Clinton Mut. Ins. Co.*, 16 *Barb.* 254; *O'Niel* v. *Buffalo Fire Ins. Co.*, 3 *Comst.* 122; *Taylor* v. *Merchants' Fire Ins. Co.*, 9 *How.* [*U. S. Sup. Ct.*] 398; *Vos* v. *Robinson*, 9 *John.* 192; *McMasters* v. *Westchester Mut. Ins. Co.*, 25 *Wend.* 379; *Rogers* v. *Traders' Ins. Co.*, 6 *Paige*, 583; *Clark* v. *The New Eng. Mut. Fire Ins. Co.*, 6 *Cush.* 342; *Underhill* v. *The Agawam Mut. Fire Ins. Co.*, *Id.* 440; *Bumstead* v. *Dividend Mut. Ins. Co.*, 2 *Kern.* 81.)

IV. If there was any delay in giving notice to the company of the loss, or in furnishing proofs of loss, beyond that contemplated by the policy, it was caused by the acts and declarations of the defendant's agent, who assumed to act for the plaintiffs, and for any such delay the plaintiffs are not to be prejudiced. (*See Bodle* v. *Chenango County Mut. Ins. Co.*, 2 *Comst.* 53; *Cornell* v. *Le Roy et al.* 9 *Wend.* 163.)

V. The receipts signed by the plaintiffs, and introduced in evidence by the defendant, are only receipts for the amounts actually paid, and can be explained by parol evidence. They should be read in connection with the instrument on which they are indorsed. (*See Ensign* v. *Webster*, 1 *John. Cas.* 145; *House* v. *Low*, 2 *John.* 379; *Tobey* v. *Barber*, 5 *id.* 68; *Thomas* v. *McDaniel*, 14 *id.* 185; *Jackson* v. *Stackhouse*, 1 *Cowen*, 122.) Besides the receipts are for loss by fire which occurred on the 18th of April, and the proof shows, and the jury found, that the loss in question occurred on the 19th of April.

DANIELS, J. The defendant insisted, upon the trial, that the testimony given on behalf of the plaintiffs did not establish an agreement to renew the policy in question. That it did not show the time for which the renewal was to be made, the rate of premium to be paid, or the payment of the premium, and excepted to the refusal of the court so to charge. There is no exception otherwise taken upon this part of the case, to the manner in which it was submitted to the jury, and that must now be assumed to have been properly done. And as the jury found a verdict for the plaintiffs, they are entitled to the benefit of all reasonable intendments in their favor, under the evidence. The question then arises whether, upon a favorable consideration of the evidence, it sufficiently tends to prove an agreement to warrant its submission to the jury.

The policy in suit was issued on or about the 24th of January, 1863, by the defendant's agent at Attica, and by its terms the defendant insured the plaintiffs against loss and damages by fire, to the amount of $1000 upon the stock of flour, mill feed and grain, in their mill near Attica, for the period of sixty days. The insurance, by its terms, expired on the 24th of the following March at noon. Other insurances had been made by the defendant, through the same agent, upon the mill, and the stock contained in it; and three of the policies continued in force to and including the time of the fire. One of these had been twice renewed by certificates issued for that purpose by the same agent. The evidence given to prove an agreement for the renewal of the policy now in controversy tends to show that one of the plaintiffs had an interview with the agent on the 27th of February, concerning the renewal of the insurance under it. In the course of the interview the agent inquired whether the plaintiffs desired to have this and another insurance in another company, on the same property expiring at the same time, renewed. The reply was that they wanted them renewed for a further time of sixty days, and in the

evening of the 24th of March, the agent was asked by the same plaintiff whether he had renewed these policies. The agent inquired when they expired, and was informed that they expired that day. He then replied that he would go right over and do it. This conversation occurred away from the agent's place of business, in one of the neighboring stores of the village. The original insurance was made for the premium of sixty cents for $100. Nothing was said respecting the amount to be charged for the renewal, but the plaintiffs had reason to suppose it was to be at the same rate for which the insurance had first been taken; for the testimony tends to show that the agent had previously renewed insurances for the plaintiff in the same way, and without the renewal being put upon the policies, and that on one occasion he renewed policies upon the mill, without any application whatever. The agent was also a banker, and the plaintiffs kept their bank account with him, and he charged the plaintiffs for insurance made upon the property, in that account, without a check. If these statements were true—and the court could not do otherwise than submit them to the jury, although they were denied and contradicted by the evidence on the part of the defense—an agreement was made to renew the insurance. The time for which a renewal was desired was distinctly stated and assented to. And as nothing transpired indicating a different understanding, or any reason for changing the rate of insurance, the reasonable inference would be, that it was to be renewed on the same terms in that respect as the risk was originally taken upon. Evidence was given tending to show that the agent had previously insured the plaintiff's property and charged the premium in their bank account which was kept with him. The jury must have found that to have been the case, and no reason existed for supposing that a different course was contemplated in this instance. The agent by his agreement assumed to do whatever was necessary to renew the insurance, upon the understanding that the details were sufficiently under-

stood between himself and the plaintiffs. He was authorized under their previous dealings to charge the premium in their account, or to resort to their implied agreement for its payment, and notwithstanding the terms of the policy, could make the renewal upon their implied promise to pay, as well as upon actual payment. (*Sheldon* v. *Atlantic Ins. Co.* 26 *N. Y. Rep.* 460.)

When this agreement was made, however, the policy had expired, and as the agreement was unwritten, the defendant claims that it was not binding upon it. The court ruled otherwise, and the defendant excepted; no evidence other than the form of the policy, and of the certificates used in making renewals, was given showing that the exercise of the agent's authority depended upon the manner in which he made contracts of insurance. The policy and certificates declared that they should not be valid until countersigned by the agent. But that does not exclude his power to bind the defendant by the agreement in question. So far as the exercise of his authority as agent is involved, it can make no difference that the time had expired for which the policy was issued. The possession and use of the defendant's certificates of renewal, together with the exercise of that authority in other instances, indicate that the power of renewing and continuing insurances had been conferred upon this agent. There is nothing in the case showing him to be confined or restricted, in the use of it, to the cases where the policy renewed was still valid as an insurance; and those who dealt with him were entitled to presume that no such restriction or qualification existed. He was authorized to accept risks, to agree upon and settle the terms of their insurance, and to carry them into effect by issuing and renewing policies on behalf of the defendant. This was sufficient to constitute him a general agent for the defendant at the place where the business of the agent was transacted. (*Lightbody* v. *North Am. Ins. Co.* 23 *Wend.* 22; *McEwen* v. *Montgomery Mutual Ins. Co.* 5 *Hill*, 105;) and he could as well exercise his

authority by renewing and continuing a policy which had already expired as by making and issuing a new one.

The agreement which, upon the evidence, the jury must have found existed in this case, did not of itself renew the insurance. But it imposed upon the defendant's agent the duty of doing whatever was necessary to effect a renewal of it. An agreement of that nature, either express or implied, must necessarily precede the renewal of any insurance, and a similar one is made to ascertain and determine the subject, term and rate of insurance in all cases where policies are issued. They are directly and necesssarily within the employment and authority of the agent, whose business could not be carried on without the power to enter into them, and the law does not require them to be in writing in order to become obligatory on the parties. They have often been the subject of judicial controversies, and always held binding on the principal, when fairly established by proof.

A recent writer on the law of insurance states the result of these authorities in the following manner: In commercial towns, actions on mere agreements to insure, whether against fire or the perils of the sea, are not uncommon, and they are always sustained whenever it appears that the terms of the agreement have been fully settled by the concurrent assent of the parties, so that nothing remains to be done, but to deliver the policy. The contract is executed in the first instance, and completed when the policy is drawn up. (*Angell on Life and Fire Insurance*, § 33.) The same principle was maintained and carried into effect in the case of *The Commercial Marine Ins. Co.* v. *The Union Ins. Co.* (19 *How. U. S. Rep.* 321.) There it was held by the supreme court of the United States, that under the common law a promise for a valuable consideration to make a policy of insurance is no more required to be in writing than a promise to execute and deliver a bond, bill of exchange, or negotiable note; and such is the general doctrine of the law, when no statutory enactment requires the contract to be in writing

to render it valid. (*Pratt* v. *Hudson River Rail Road Co.*, 21 *N. Y. Rep.* 305.) It is not contended in this case that the contract of the agent to renew an insurance previously made by him in his capacity of agent is affected by any statutory provision of that character. The principle maintained in the case of the *Marine Ins. Co.* v. *Union Ins. Co.* (19 *How.* 321,) is substantially affirmed by the court of appeals in this state, in the case of *Trustees &c.* v. *Brooklyn Fire Ins. Co.* (19 *N. Y. Rep.* 305.) In that case there was an unwritten agreement to continue the policy from year to year, until notice to the contrary should be given, which was held binding upon the company, notwithstanding the policy declared that it might be continued provided the premium therefor was paid, and indorsed on the policy, or a receipt given for it, and that no insurance whatever, original or continued, should be considered binding until the actual payment of the premium. If the agent had properly filled up and countersigned the certificate, as he should have done under the agreement, the defendant would have been bound by it without an actual delivery of it to the plaintiffs. He would have held it from that time as their trustee, or agent; (*Angell on Life and Fire Ins.* §§ 31, 32; *Kohne* v. *Ins. Co. of North Am.* 1 *Wash. C. C. R.* 93;) and in case of loss, their remedy would have been perfect upon it, as upon an insurance actually effected.

But upon the agreement which was made in this case, the action should be for its specific performance in equity, or at law, for the breach occasioned by the failure to renew the insurance. Either form could be adopted with equal propriety. (*Taylor* v. *Merchants' Ins. Co.* 9 *How. U. S. Rep.* 405; 19 *id.* 321, *supra.*) The distinction between the forms of action, in a case like this, is rather more fanciful than real. For where the action is for a specific performance, the court considers the agreement which the party was under a legal obligation to have made, the same as made, and decrees the payment of the money, which would have been payable

under the consummated agreement, (*Perkins* v. *Washington Ins. Co.* 4 *Cowen*, 645;) and where the action is at law for the damages arising out of the breach of the agreement, the relief recovered is the same. (*Pratt* v. *Hudson River R. R. Co.*, 21 *N. Y. Rep.* 314.)

The complaint in this case is sufficiently broad to comprehend the action, as one for the breach of the agreement to renew the insurance. But if not, the variance would be immaterial. (21 *N. Y. Rep. supra.*) So far as the contract is involved the defendant was liable, and the liability may be properly enforced in this form of action. But the defendant insists that even if the agreement to renew the policy was binding upon it, no recovery can be had, on account of the delay in serving the proofs of loss. The policy contained the provision that persons having a claim under it should give immediate notice thereof, and render a particular account thereof, with an affidavit stating the time and circumstances of the fire, the whole value and ownership of the property insured, the amount of the loss, or damage &c.; and until such proofs are rendered the loss shall not become payable. By its terms losses are payable within sixty days after the due proof of the amount. Unless the delay in serving the proofs of the loss has been reasonably excused or waived by the defendant, this action can not be maintained. (*Inman* v. *The Western Fire Ins. Co.* 12 *Wend.* 452.) Upon the trial of the cause the plaintiff endeavored to excuse the delay in this respect, and also to prove a waiver of the proofs by the defendant. The evidence on this subject shows that notice of the loss was given to the defendant's agent, the day after the fire occurred, and he made a personal inspection of the ruins at that time. He then became satisfied that the plaintiff's loss exceeded the amount of their other insurances. For when the general agent of the defendant adjusted the loss, under those policies, on the 23d of April, he inquired of the local agent, if there was any doubt about the amount of the personal property, to which the local agent

replied that he thought the plaintiffs had lost all their insurance amounted to, and more. It is not, therefore, probable that any actual injury was sustained by the defendant in consequence of the delay in serving the proofs. But their service, under the terms of the policy, is a condition precedent to the defendant's liability, which is not affected, in legal contemplation, by the fact that its non-performance was unproductive of injury. It may however be partially, or wholly, waived by the party entitled to insist upon the performance of it. And such waiver may be express, or it may be inferred from circumstances. The objection to paying was not that the proofs were not served, but that there was no legal liability on the part of the defendant for the payment of the loss. The agent insisted that the policy had not been renewed, and that no agreement for its renewal had been entered into, notwithstanding that he promised to submit the claim to the consideration of the company. And after that, when the other losses were adjusted, on the 23d of April, this claim was renewed. Then the agent replied that insurance companies were not benevolent societies, and they did not intend to do any thing about this policy, and another similarly situated, as they did not consider them renewed. If they had intended to resist payment, on account of the failure to serve the preliminary proofs, they should have so informed the plaintiffs. For they were then in time, and had the ability to remove that objection at once, by making and serving the proofs. Mere defects in the proofs served have often been held waived by an omission to insist specifically upon them, when it was in the power of the party to correct and supply the defects. (*Ætna Ins. Co.* v. *Tyler*, 16 *Wend.* 385. *McMasters* v. *The Westch. Ins. Co.* 25 *id.* 379. *Bumstead* v. *The Dividend Mut. Ins. Co.* 2 *Kern.* 81, 99. *O'Neil* v. *Buffalo Mut. Ins. Co.* 3 *Comst* 122.) These cases concur in maintaining the principle that if the underwriter intends to insist upon defects in the proof he must notify the insured of that intention in time to afford

him an opportunity to correct them. The same principle was extended to a very material defect in the proofs, in the case of *Allegree* v. *Maryland Ins. Co.* (6 *Har. & John.* 408.) The company there declined payment, on the ground that it was not answerable for the loss. The court say: "If they intended to refuse payment of the loss because the invoice, a customary part of the preliminary proofs, had not been laid before them, it was their duty to have informed the insured, and their failure to do so, and the writing of such a letter, was a waiver of all preliminary proofs." So an answer that the underwriter would not sell the claim in any way has been held a waiver of any imperfection in the preliminary proofs. (*Clark* v. *New England Fire Ins Co.* 6 *Cushing*, 342.)

The reason upon which the principle is founded would equally justify its extension in a proper case to the waiver of proofs altogether. The conduct of the underwriter has the same tendency to mislead the party claiming indemnity, in that case, as it has where defective proofs have been furnished. When the underwriter refuses to pay because no valid contract has been entered into, the impression is necessarily conveyed, and the claimant has reason to believe, that the refusal is made solely and exclusively on that account. The company has the same power to waive the condition entirely as it has to accept an imperfect or merely colorable performance of it. Conditions precedent are waived by such conduct on the part of the party entitled to insist upon them, as is inconsistent with the purpose to require the performance of them. (*Ogden* v. *Marshall*, 4 *Seld.* 340. *Cornwell* v. *Haight*, 21 *N. Y. Rep.* 465. 3 *Phillips' Ev.* 100. *Grant* v. *Johnson*, 1 *Seld.* 252.) And contracts of insurance constitute no exception to the rule. (*Parsons on Mercantile Law*, 526. *Westlake* v. *St. Lawrence Mut. Ins. Co.* 14 *Barb.* 206.) In *Taylor* v. *Merchants' Ins. Company*, (9 *How. U. S. Rep.* 390,) this principle was carried into full

effect. The defendant's agent proposed by letter to insure the plaintiff's property upon certain terms mentioned. The latter replied the following day by letter accepting the terms. The next day, and before the letter reached the agent, the subject of the insurance was destroyed by fire. No policy was in fact issued, and the company afterwards refused to issue it, or pay the loss. The fire occurred on the 22d of December, 1844, and the proofs of loss were served on the 24th of November, 1845. The form of policy used by the defendant required the proofs to be served within a reasonable time. Nelson, J. delivered the opinion of the court, holding that the ground upon which the complaint originally placed their resistance to the payment of the loss, and which still is mainly relied on as fatal to the proceedings, operated as a waiver of the necessity for the production of the preliminary proofs. That is, that no obligation to insure the loss was ever entered into by the company, the contract being incomplete at the time it occurred. The objection went to the foundation of the claim, which, in connection with the refusal to issue the policy, superseded the necessity of producing these proofs; as the production would have been but an idle ceremony, on the part of the insured, in the further prosecution of his right. (*Id.* 403.)

This case is entitled to great weight in the disposition of the present suit, because it is directly in point upon this as well as the preceding question. It is not essential that the waiver should depend upon the direct conduct of the company as distinguished from its agent. In this matter, however, he seems to have acted under explicit directions given by the defendant after this claim had been brought to its consideration. But if he did not, he was a general agent, and as such could himself waive the compliance with the condition. (*Sheldon* v. *Atlantic Ins. Co.* 26 *N. Y. Rep.* 460.)

The remaining question arises upon the effect to be given to the releases. One of these was made and executed upon each of

the policies which were settled. The consideration mentioned in each release is the amount paid to settle the loss arising under the policy it is given upon. And the release surrenders, and cancels, the policy on which it is made. If it was intended or supposed that the language used in these different releases was broad enough to comprehend other claims, besides that arising out of the policy on which the release is made, as it is now insisted it was, there would have been neither reason nor propriety in taking a similar discharge upon each policy. That circumstance indicates the intention and understanding of the parties to have been to limit the release in each case to the discharge of the debt alone for which it was given. For the purpose of ascertaining this intention, the court should place itself in the situation of the parties, and consider the effect they designed their language to have, in view of the attendant circumstances. (1 *Greenl. on Ev.* § 287.) And as the object seems to have been to secure merely the discharge of the debt mentioned in the release, and the surrender and cancellation of the policy creating it, and nothing beyond that, the general terms employed should be limited to that object. (*Jackson* v. *Stackhouse*, 1 *Cowen*, 122, 126.) Under this construction they furnished no objection whatever to the right of the plaintiffs to maintain this action.

Judgment should be directed for the plaintiffs, on the verdict.

Davis, J. The jury have by their verdict disposed of the question whether the alleged agreement to renew the policy of insurance was made. It is well established that a parol contract to renew a policy is valid. (*First Baptist Society* v. *Brooklyn Fire Ins. Co.*, 19 *N. Y. Rep.* 305, *and cases there cited.*) No point is therefore made as to the sufficiency or validity of the agreement to renew, except so far as it is affected by a supposed limitation upon the authority of the

agent of the company to contract otherwise than by issuing a certificate, countersigned by him.

But three questions were presented on the part of the defendant, for our consideration on this motion. The first is, whether the plaintiffs have complied with the condition of the policy which required them to give immediate notice of their claim and render a particular account thereof, with an affidavit, &c. The loss occurred on the 19th day of April, 1863. No particular account thereof under this alleged insurance, with the prescribed affidavits, were served till the 1st day of July thereafter. This delay is undoubtedly fatal to the claim, under the authorities, unless it is sufficiently excused, or a strict compliance with the condition is shown to have been waived by the defendant.

It appears that the defendant had other policies on the property destroyed by the fire, to wit, one on the building and another on the stock contained therein. Notice of the fire was given to the defendant's agent on the morning following its occurrence. He went to the premises in company with the plaintiffs, and, according to the testimony of one of the plaintiffs, it was there understood between them and the agent that the whole insurance on the property was $7500, which included the amount of the policy now in question. Immediately thereafter the agent of the defendant prepared notice of the claims on the other policies, with the formal affidavits and certificates stating with particularity the property destroyed and its value. The plaintiffs, at the same time, claimed that the agent had made the agreement to renew the policy in suit, and, substantially, that they were entitled to be paid the amount of that policy. The value of the stock destroyed exceeded the amount of the whole insurance, and no question was made as to whether the loss had occurred as alleged, nor as to the kind and value of the property. The agent denied and repudiated the alleged agreement to renew the policy. In legal effect the defendant, in

respect to the loss under this policy, put itself upon the distinct and single ground that no insurance existed and no valid agreement to insure had been made, and denied its liability in toto. I think this operated as a waiver of the requirement of the policy to present immediately a notice of the claim with the particular account thereof.

The cases on the question of waiver are numerous, and substantially settle that where a refusal to pay the loss is put upon grounds other than the insufficiency or defectiveness of the notice or proofs furnished, the company will be held to have waived objections of that character. (*Tayloe* v. *Mercants' Fire Ins. Co.*, 9 *How.* [*U. S. R.*] 390. *O'Niel* v. *The Buffalo Fire Ins. Co.*, 3 *Comst.* 122. *Ætna Co.* v. *Tyler*, 16 *Wend.* 385. *Bodle* v. *Chenango Fire Ins. Co.*, 2 *Comst.* 53. *Child* v. *Sun Mut. Ins. Co.*, 3 *Sand.* 26. *Bumstead* v. *The Dividend Mut. Ins. Co.*, 2 *Kern.* 81. 23 *Wend.* 525. 9 *id.* 163.) "In 6 *Cushing*, 343," (says Gardner, Ch. J. in *Bumstead* v. *The Dividend Mut. Ins. Co.*,) "the plaintiff's application provided that he should be bound by the act of incorporation, which declared that the insured should, within thirty days after the loss, give notice in writing. The only notice given was by the letter of the agent of the company, not purporting to be upon the request of the insured. It was held that the defendants were in fact notified and their president had visited the ruins, and as no objection was taken to the form of the notice and they did not put their refusal upon that ground, but declined paying altogether, they had waived further notice. The same doctrine was affirmed in *Underhill* v. *Agawam Co.*, (6 *Cush.* 445,) and in 16 *Wend.* 385, 401, and 23 *id.* 525, 527."

In *Tayloe* v. *The Merchants' Ins. Co.*, (9 *How.* 390,) the question was raised that the usual preliminary proofs were not furnished according to the requirements of the conditions annexed to the policy. The fire occurred on the 22d of December, 1844, and the preliminary proofs were not fur-

nished till the 24th day of November, 1845. The court considered that this was too late, and it would have been fatal to the plaintiff's claim but for the fact that the company placed their refusal to pay the loss on the ground that no obligation to insure was ever entered into by the company; the contract being incomplete at the time the loss occurred. The company in that case, as in this, refused to recognize any obligations arising out of the arrangement between their agent and the assured. The refusal to recognize the existence of any claim renders the delivery of notice and proofs a useless ceremony, and must, under the authorities cited, be regarded as waiving a strict compliance with the condition as to preliminary notice and proofs, both in form and time. It follows that the notice given in the case, and the proof furnished in July, were a sufficient compliance with the requirements of the policy in this case.

The second point made by the defendant is, that the receipt of April 23, 1863, for $1000, less interest, executed under the hands and seals of the plaintiffs, was an agreement to receive that sum in full satisfaction of all loss or damage sustained by them on the stock, by the fire. This receipt was indorsed upon the other policy held by the plaintiffs upon the same stock. The amount of that policy was $1000, and the sum paid was precisely what they were conceded to be entitled to under that policy. There is no room for the idea that it was paid with any view to a compromise or adjustment of the demand in this suit; and I think the fact of its indorsement on the other policy, as a cancellation of it, shows that it was intended only as a payment of the admitted claim under that policy, and requires the receipt to be construed with particular reference to that policy. It should be read as though the words "under this policy" were inserted after the word "damage" in the receipt.

But if this be not so, it is obvious from the evidence that the instrument was not designed as an agreement of accord

and satisfaction of the claim now in suit. As a receipt it was open to explanation, and the fact that it was sealed did not change its character in that respect. The testimony showed quite clearly that the receipt embraced nothing but the loss under the policy on which it was indorsed.

The remaining point is, that the agent had no authority to make a parol extension of the policy. What the particular authority of the agent was is not shown; nor does it appear whether it was in writing or by parol. The point made is based upon the fact that the policy declares that it shall not be valid unless countersigned by the agent; and forms of renewal furnished by the company contain a clause to the same effect. From these facts it is insisted, that the agent had no authority to contract, except by the use of one of these forms subscribed by the officers of the company and countersigned by the agent. It is the custom of the company to furnish agents with policies in blank, subscribed by the officers and ready to be filled out and delivered to the agent. To guard against frauds which might be committed or attempted if these policies should get into the hands of strangers, the company have inserted the clause in question: "*This policy*," or "*this renewal*," shall not be valid unless countersigned by the agent named. The countersign of the agent is therefore necessary to the validity of one of these instruments in the hands of the insured; but does it operate as a limitation of the power of the agent to agree to insure or renew? The company must in all cases act by agents, and though it may provide that certain forms of agreement shall not be operative without certain formalities of execution, it does not therefore follow that no obligatory agreement can be made in any other form.

I think the cases of *First Baptist Church* v. *Brooklyn Ins. Co.*, (19 *N. Y. Rep.* 305,) and *Perkins* v. *The Washington Ins. Co.*, (4 *Cowen*, 645,) in principle determine this question against the defendant.

From these views it follows that the motion for new trial should be denied, and judgment ordered for the plaintiffs on the verdict.

GROVER and MARVIN, JJ. concurred.

Judgment for the plaintiffs.

[ERIE GENERAL TERM, November 21, 1864. *Davis, Grover, Daniels* and *Marvin*, Justices.]

LUMMIS and others *vs.* KASSON, Sheriff, &c.

43 373
62h 513
43 373
11h 570
17h 61
42h 1?

After a sheriff has seized property upon a warrant of attachment, and has advertised the same for sale upon an execution issued in the attachment suit, upon receiving an *indemnity* from the plaintiff, he is at liberty to return the execution *nulla bona*, on the property being taken out of his possession; provided he acts in good faith; but in so doing he assumes the responsibility of proving property out of the defendant in the execution, and thus supporting his return.

In an action against the sheriff for a false return, in such a case, after the plaintiff has introduced evidence sufficient, *prima facie*, to establish property in the judgment debtor, and a levy thereon, the sheriff has a right to controvert such evidence, and to prove that such property did not belong to the judgment debtor, but to another person.

ON the 20th of January, 1863, the plaintiffs commenced an action, in the supreme court, against Francis Herrick. An attachment was issued, on the same day, to the defendant in this action, as sheriff of the county of Steuben, and delivered to him. One Wetmore, a deputy of the defendant, thereupon seized property to a sufficient amount to satisfy the attachment, and had the same inventoried and appraised as required by statute. At the same time Wetmore asked the plaintiffs for an indemnity bond, which they immediately gave. No sheriff's jury was ever called, to try the title to the property levied on. In March, 1863, the plaintiffs ob-

tained a judgment in their action against Herrick for $529.57, and on the 3d day of April, 1863, an execution was duly issued thereon to the defendant as sheriff, and received by him on the 6th day of May, 1863. In the latter part of May, Wetmore advertised for sale under the execution the property previously attached; the sale to take place on the 5th of June. The plaintiffs being notified of the sale, one of them, on the 4th of June, attended at the place of sale. He then for the first time learned that Wetmore had left the property in Herrick's store; and noticed some other suspicious circumstances, which he mentioned to Wetmore, who assured him that it was, and would be, all right. The plaintiffs were informed that the property advertised was claimed by one William H. Herrick. The next day, the property was not to be found, having been removed from the store of the judgment debtor; and the sale was postponed indefinitely. The execution was subsequently returned *nulla bona;* and this action was brought against the sheriff, to recover damages for a false return. On the trial, the plaintiffs offered no evidence that the judgment debtor, Francis Herrick, was the owner of any property, liable to execution, or otherwise. The defendant offered to prove that the property levied upon, under the attachment and execution, did not belong to Francis Herrick, but did belong to one William H. Herrick, and was in his possession, and had been mortgaged by him and also by Francis Herrick, &c. &c. All of which testimony the court ruled out, and the defendant excepted.

The court directed the jury to find a verdict in favor of the plaintiffs for $567.43; to which order the defendant excepted. The jury found accordingly, and judgment having been entered, the defendant moved for a new trial upon a case and exceptions.

S. T. Freeman, for the plaintiffs.

D. Rumsey, for the defendant.

By the Court, JAMES C. SMITH, J. I am of opinion that in rejecting the offer of the defendant to show that the property levied upon under the attachment and execution was the property of William H. Herrick, and not of the judgment debtor, the judge at the circuit fell into an error.

The question turns upon the construction of certain statutory provisions respecting the duties of a sheriff in executing an attachment.

The code directs that the sheriff shall proceed upon a warrant of attachment, in all respects, in the manner required of him by law in case of attachments against absent debtors. (*Sec.* 232.) In such cases, the revised statutes provide that if any goods seized as the property of the debtor shall be claimed by any other person as his property, the sheriff shall summon and try the validity of such claim, "in the same manner, and with the like effect, as in case of seizure under execution." (2 *R. S.* 4, § 10.) If the jury find the property of the goods to be in the claimant, the sheriff shall forthwith deliver them to him; unless the attaching creditor shall, by bond, indemnify the sheriff for the detention of such goods; in which case the sheriff shall detain them. (§ 11.)

It appeared on the trial that soon after the plaintiffs delivered the warrant of attachment to the sheriff, his deputy informed them, by letter, that he had made a levy, but that the title to the property would be contested, and requested them to furnish a bond of indemnity to the sheriff, which they did, without requiring him to summon a jury to try the title. Subsequently, they obtained a judgment on their demand, and delivered an execution to the sheriff's deputy. That officer afterwards notified the plaintiffs that he had advertised the property for sale, and one of the plaintiffs attended at the time and place appointed for the sale, but did not see the property, and the deputy informed him that it had been taken from his possession, and there would be no sale. The execution was afterwards returned *nulla bona*.

The ruling in question necessarily assumes that the de-

fendant, on being furnished with a sufficient bond of idemnity, was absolutely bound by the requirements of the statute to detain the property, and not having done so, that he is liable to the plaintiffs for the amount of their judgment. I do not think this view of the statute is correct. The statute was intended merely to make applicable to the case of an attachment certain well known rules of the common law relating to the duties of sheriffs in respect to executions, to which it will be useful briefly to refer. As on a *fi. fa.* the sheriff is bound at his peril to take only the goods of the defendant, and is liable as a trespasser if he take the goods of a third person, though the plaintiff assure him they are the defendant's, the law permits him, in case he doubts whether the goods shown him are the defendant's, to summon a jury *de bene esse*, to satisfy himself. This will justify him in returning, if it be so found, that the defendant has no goods within his bailiwick, although it should afterwards turn out that the goods were the defendants; unless it be shown that he did not act in good faith. (*Tidd's Pr.* 921, *and authorities there cited.*) It was held, however, by the supreme court of this state in *Bayley* v. *Bates*, (8 *John.* 185,) and *Van Cleef* v. *Fleet*, (15 *id.* 147,) that if the plaintiff in the execution tenders a sufficient bond of indemnity to the sheriff an inquisition will not justify that officer in returning that the defendant has no goods, if the fact turn out to be otherwise. This is upon the ground that the inquisition is not conclusive of the right of property, but is merely designed to protect the sheriff, and the indemnity, when tendered, has the same effect. But even after a levy, and an inquisition finding the goods to be the property of the defendant, I apprehend the sheriff is at liberty to return *nulla bona*, provided he acts in good faith; but in so doing, he assumes the responsibility of proving property out of the defendant in the execution, and thus supporting his return. And I think it reasonable to hold that he may make the same return after *indemnity*, but in so doing he assumes the like responsibility;

and this is what is meant by the expression in the books that in such cases he acts at his peril. (8 *Cowen*, 65. 5 *Wend.* 309. 7 *id.* 236.)

The act of 1813, "for relief against absconding and absent debtors" provided merely that "if any sheriff shall ignorantly seize any goods which shall be claimed by any person as his property, he may summon a jury, and if they find the property to be in the claimant, the sheriff shall deliver the goods to him, and shall not be liable to prosecution for such seizure." The additional provisions of the revised statutes already referred to, are new. The revisers, in reporting the sections cited, say they are varied only so far as to allow the sheriff to retain the goods, upon sufficient indemnity, according to the decisions of the supreme court in cases of inquisition upon an execution, in *Bayley* v. *Bates*, and *Van Cleef* v. *Fleet*, (*supra*; 3 *R. S. 2d ed.* 613.)

The construction above suggested is supported by the case of *Batchellor* v. *Schuyler*, (3 *Hill*, 386.) It was there held that where goods seized on an attachment against an absconding debtor are claimed by a third person, the finding of a jury summoned to try the validity of the claim is not conclusive upon the parties; and hence the sheriff may refuse to deliver the goods to the claimant, though the finding be in his favor, and no bond of indemnity be tendered by the attaching creditor; and that the only consequence of such refusal is, that the sheriff assumes the burthen of showing, in an action against him by the claimant, that the goods are the property of the debtor. The reasoning of Chief Justice Nelson, in that case, throws much light upon the meaning of the statute.

The construction contended for by the plaintiffs might work great injustice to the officers of the law. If the judgment debtor in fact has no property within the bailiwick of the sheriff, why should that officer, if he has acted in good faith, be compelled to pay the demand of the attaching creditor? The rights of the creditor are sufficiently guarded by allowing him, on tendering a bond of indemnity, to deprive

the sheriff of the protection of an inquisition in favor of the claimant, and, in case he returns *nulla bona*, to subject him to the burden of supporting his return by proving property out of the defendant.

It has been held, in England, that in the defense of an action for a false return of *nulla bona*, to an execution, the sheriff may show that the goods of the debtor were absorbed by a prior execution in his hands; (5 *B. & C.* 660; 2 *Gr. Ev.* 555, § 592;) and in such case the plaintiff may rebut this evidence by proving that the prior execution was concocted in fraud, and that the sheriff had previous notice thereof, and was required by the plaintiff not to pay over the proceeds to the prior creditor. (*Id.*)

In Massachusetts it has been repeatedly decided that in an action against a sheriff for not seizing upon execution chattels which he had attached upon the original writ, it is a good defense that such chattels were the property of strangers, and not of the debtor. (4 *Mass. Rep.* 498. 12 *id.* 167. 13 *id.* 224.) The sheriff is not concluded, in such cases, by his return of a levy. (6 *M. & S.* 42. 23 *Wend.* 291.) Besides, in the case at bar there was no formal return.

In order to present this question in the most favorable light for the plaintiffs, I have assumed that the bond of indemnity, although furnished voluntarily, on request, has the same effect as if it had been tendered after an inquisition found in favor of the claimant.

The evidence introduced by the plaintiff was sufficient, *prima facie*, as against the sheriff, to establish property in the judgment debtor; but the sheriff had a right to controvert that point, and because the right was denied him I think there should be a new trial.

[Monroe General Term, December 5, 1864. *J. C. Smith*, *Welles* and *E. Darwin Smith*, Justices.]

The Traders' Bank of Rochester *vs.* Lester Bradner and others.

The payee of a draft, being in possession of it, is presumed to hold it for his own use and benefit, and the draft imports a debt due from the drawees to the drawers, which is assigned to the payee.

The holder of commercial paper, who has received it for an antecedent debt, either as a *security* for payment, or as a *nominal* payment, without parting with any security, property or other thing of legal value, or giving any new consideration, is not a holder for a *valuable* consideration.

If, however, he has paid value for the paper, or, on the credit thereof, has relinquished some available security or valuable right, or has expressly assumed some new legal obligation, he is a holder for value, although the paper is available to him as security for a pre-existing debt.

The plaintiff, being the holder of nine drafts, amounting in the aggregate to $21,000, which it had previously discounted, and which were near maturity, L. the drawer of some of them and the indorser of others, transferred to the plaintiff, as collateral security for the payment of said nine drafts, a draft on L., S. & Co. for $17,000, made by B. & Co., payable subsequently to the maturity of each of the nine drafts to the order of, and indorsed by, L. The plaintiff, in consideration of such transfer, expressly agreed that it would not sue the drawer or drawees, upon either of said nine drafts until the maturity of the draft of B. & Co. thus transferred. *Held* that this agreement for forbearance as to the nine drafts, was a valuable consideration, within the meaning of the rule protecting the holders of negotiable paper; and that the plaintiff was to be regarded as a holder for value, to the full amount of the draft of B. & Co.

A partnership may be indebted to a member of the firm, and may bind itself to him by note or bill. And though the payee can not enforce the obligation at law, by reason of the technical legal rule that a man can not sue himself, yet he may have relief in equity; and his indorsee may recover at law.

THE action is against Lester Bradner and Lewis W. Carroll makers, as copartners under the firm name of Bradner & Carroll, and the other defendants as acceptors, as copartners under the firm name of Lowrey, Strang & Co. of a draft of $17,000, dated February 6, 1862, payable ninety days after date, to the order of D. Lowrey, indorsed by him, accepted by the drawees and discounted by the plaintiff. The defenses by Bradner were, first, the denial of a copartnership of himself and Carroll at the date of the draft; also a denial that they made and delivered the draft, and transferred the same for

a valuable consideration to Daniel Lowrey. Second, that Carroll, without the knowledge, consent or authority of the defendant Bradner, signed the name of Bradner & Carroll upon five pieces of paper, and delivered the same to Daniel Lowrey, authorizing him to write over each of the signatures a draft on Lowrey, Strang & Co.—the five drafts not to exceed $10,000—for the benefit and accommodation of the drawees; that before either of the papers were used, Carroll gave notice to Daniel Lowrey that the former had no authority to make the signature, and directed the latter not to use the same; that in March, 1862, Daniel Lowery filled up one of said blanks with the draft in question, and delivered the same to the plaintiff as collateral security for an indebtedness to the plaintiff by Daniel Lowrey, or Lowrey, Strang & Co.; and that the making and delivery of the paper, and transfer of the draft, were without the knowledge, consent or authority of Bradner. The defenses by Carroll were, that about the 21st of March, 1862, at the request of Daniel Lowrey, he signed the name of Bradner & Carroll on five pieces of paper, and delivered the same to Daniel Lowrey, authorizing him to write over each a draft on Lowrey, Strang & Co., the five not to exceed $10,000, for the benefit and accommodation of Peter O. Strang, Goodwin Lowrey and Daniel Lowrey; that after the delivery of said papers to Daniel Lowrey, and before he had filled up or used them, the defendant Carroll gave notice to Daniel Lowrey not to fill up or use them; that afterward, in the said month of March, Daniel Lowrey wrote over one of said papers the draft in question and delivered it to the plaintiff as collateral security for an indebtedness to the plaintiff, of Daniel Lowrey, or Lowrey, Strang & Co., and the defendant Carroll denies that Bradner & Carroll made the draft, except as aforesaid, and he denied that the same was transferred for value to Daniel Lowrey.

Daniel Lowrey was a son-in-law of Carroll, and one of the firm of Lowrey, Strang & Co., composed of him and Peter O. Strang and Goodwin Lowrey; that the firm were wool

dealers; that Daniel resided and attended to the business of the firm in Rochester; the other members resided in New York. That about the middle of March, 1862, Daniel Lowrey applied to Carroll, at his house, for some drafts, saying he wanted to raise $10,000 to send to his friends east; that Carroll was about leaving for Bath, and not having time to fill them up and get to the car, he signed the name of Bradner and Carroll to five papers in all, the same being blanks except the signatures, and left them with Daniel Lowrey, who said he would fill them up with $2000 each; that Carroll on his return in the evening saw Daniel Lowrey at Livonia station, and told him he must not use those drafts until Carroll should see him, and he said he would not; that Carroll never gave him authority to use them; that Carroll did not know there was such a draft as the one in question, until informed by the financial officer of the plaintiff that the draft was given for the accommodation of Lowrey, Strang & Co., and for their use. That Carroll made other paper of this character, at the request of Daniel Lowrey, in the winter of 1861–2, and spring of 1862, some filled in part, some signed in blank, as many as twenty; Bradner knew nothing of any of them; he did'nt authorize any of them. Then came times when Lowrey, Strang & Co. suspended, and these drafts began to be protested; Carroll received notice of protest on drafts amounting to $80,000 up to some time in May. Carroll told Daniel Lowery he had no business to sign the name of Bradner & Carroll to the paper. He said it would make no difference, for Lowrey, Strang & Co. would take care of it. Lowrey, Strang & Co. suspended March 28, 1862. Carroll never told Bradner he was using the firm name in their business. That Bradner never authorized Carroll to make that paper; he did not know of it; he never authorized Carroll to sign the name of the firm to blank paper; Bradner & Carroll did not receive any of the avails of that draft, or any benefit from it. Carroll never had any authority from Bradner to use the firm name outside of the co-partnership busi-

ness. It was further proved that the plaintiff did business with the firm of Bradner & Carroll, during the existence of that firm, in discounting their notes presented by Carroll, and drafts presented by him drawn on Lowrey, Strang & Co., the last on the 21st of September, 1861; all that paper was paid at maturity. Daniel Lowrey first commenced doing business with the plaintiff in the fall of 1861; the plaintiff knew he belonged to the firm of Lowrey, Strang & Co., and knew who composed that firm. The draft in suit was received by the plaintiff of Daniel Lowrey, after the 19th and before the 24th of March, 1862. At that time the plaintiff held seven drafts, drawn by Daniel Lowrey on Lowrey, Strang & Co., amounting to $17,000, and two drawn by Bradner & Carroll on the same, amounting to $4000, payable to the order of D. Lowrey. The last two drafts were for $2000 each, one due the 31st of March, the other the 9th of May. The former, due the 31st of March, was put in suit, and was arranged and paid by Daniel Lowrey. The latter, due the 9th of May, was secured by Daniel Lowrey or Lowrey, Strang & Co., so that Bradner & Carroll were released from it. James W. Russell, the financial officer of the plaintiff, testified that the consideration upon which the $17,000 draft in suit was received by the plaintiff was the extension of time upon the *nine* drafts held by the plaintiff, until the draft in suit should mature; that he regarded that draft as collateral paper, and kept it with the collateral paper; that the plaintiff took the draft in suit as collateral to balances of the *seven* drafts, in the place of these drafts, and agreed to extend the time on them. The arrangement was that Daniel Lowrey, or Lowrey, Strang & Co., should not be sued on these drafts; that he did not advance any money to Lowrey, or any one, at the time he received the draft in suit. That, in the conversation with Lowrey, the only arrangement was that the drafts should not be sued. The draft was received in consideration of extending the time of payment of the draft as to Lowrey,

Strang & Co., and not as to Bradner & Carroll. It was further proved that the filling up of the draft in suit, and the acceptance, are in Daniel Lowrey's handwriting. Whether it was accepted when received by the plaintiff, the witness Russell testified he did not know. Several decisions adverse to the defendants, on questions of evidence, were made in the progress of the trial, to which exceptions were taken by the defendants. The facts in relation to the exceptions, so far as it is deemed important to refer to them particularly, appear in the points. At the close of the evidence the defendants moved for a nonsuit on several grounds. The court denied the motion, and the defendants excepted. The court directed a verdict for the plaintiff, to which the defendants excepted. Exceptions directed to be argued in the first instance at the general term.

Geo. F. Danforth, for the plaintiff. I. The decision of the court was correct. The agreement to give time upon the drafts held by the plaintiffs was a present and valuable consideration, as much so as the actual payment of money. (1.) It operated like a new loan of the sums represented by the drafts, for the time which should intervene between their maturity and the maturity of the one in question. (2.) It prevented any measures by action for the recovery of the money. (3.) It was a benefit to Lowrey, the transferrer, and a detriment to the plaintiff. (4.) Its sufficiency to uphold the title in the plaintiff is determined by authority. (*Waters* v. *Glassop*, 1 *Ld. Raym.* 357. *Yard* v. *Gland*, *Id.* 368. *Com. Dig. Assumpsit*, [*B.* 1.] [*B.* 2.] *Jennison* v. *Stafford*, 1 *Cush.* 168. 1 *Parsons on Bills*, 224. *Burns* v. *Rowland*, 40 *Barb.* 368, 374. *Story on Notes*, § 186. 10 *Ohio Rep.* 497. 33 *Barb.* 458, 465, 621.) The above position is entirely consistent with the cases of *Coddington* v. *Bay*, (20 *John.* 637, and *Stalker* v. *McDonald*, (6 *Hill*, 113.) So in *Prentiss* v. *Graves*, (33 *Barb.* 621,) a note had been made for the purpose of paying a certain draft held

by the plaintiffs; the note was delivered to the plaintiff, who received it, not in payment, but as security. They afterwards sued the note, and a defense similar to that in this case was set up and sustained; Campbell, J. saying, (*p.* 624,) "the plaintiffs gave no new consideration, nor parted with any property, nor gave up any other security, *or agreed to extend the time of payment of the draft.*" In *Burns* v. *Rowland*, (40 *Barb.* 368,) to an action on a draft a defense similar in principle was set up. But the court say: "It appears, however, that the debt of Hussey (the transferrer) to the plaintiff was due, and the plaintiff before taking the draft had a right to enforce its payment presently. By receiving the draft he relinquished this right, and his power to collect the debt from Hussey was suspended until the draft should mature. *This was a sufficient and valuable consideration.*" And the plaintiff had judgment. In *Mechanics' Bank* v. *Livingston*, (33 *Barb.* 458, 465,) the court, (*p.* 465,) say: "By accepting the draft the bank is postponed, and a forbearance is necessarily granted, *which is a sufficient consideration* for the acceptances." It is submitted that the plaintiff's case is well within the principle of the rule which protects the holder of commercial paper, and is sustained by the settled law of the courts of this state.

II. Many other points involved in the motion for a nonsuit, and suggested by the grounds on which it was made, were urged upon the trial, by the defendant. If urged upon this motion, the respondent insists that they are of no validity. 1. The defendant did not desire the submission of any question to the jury, and, therefore, every fact essential to support the plaintiff's case, which the jury would be warranted to draw from the evidence, must be deemed established, and the case treated as if the jury had found those facts, and the judge had applied to them the rule of law. (*Bidwell* v. *Lament*, 17 *How. Pr. Rep.* 357.) But if the court hold otherwise, then, 2. The plaintiff had no notice that the draft was drawn for the accommodation of D. Lowrey. 3. Although

the plaintiff did know that Lowrey was a member of the firm of Lowrey, Strang & Co., neither it alone, nor it in connection with the fact that D. Lowrey is named as payee in the note, and he was in possession of it, is sufficient in any way to affect the plaintiff's title. (*a.*) The payee of a draft is the person who should be in possession of it. (*b.*) The draft implies that Lowrey, Strang & Co. owe Bradner & Carroll, and that the latter desire the amount paid to D. Lowrey or his order. Such a state of facts would not even be unusual. In this case it even appeared that Lowrey was carrying on in Rochester the business of buying sheepskins, on his individual account and under his individual name, and that this was known to the plaintiff. (*c.*) It is true that D. Lowrey could not sue the acceptors, but that is because of a technical rule of law only, which prevents the same person from being plaintiff and defendant in one suit. He could, however, sue the drawers, and his indorsee could sue both the drawers and acceptors. (*Temple* v. *Seaver*, 11 *Cush.* 314. *Thayer* v. *Buffum*, 11 *Metc.* 398. *Pitcher* v. *Barrows*, 17 *Pick.* 361. *Smith* v. *Lusher*, 5 *Cowen*, 688. *Johnson* v. *Negley*, 25 *Penn. Rep.* 297.) (*d.*) The case is in no respect like the cases referred to in behalf of the appellant. In those the note in question was found in the hands of the maker after indorsement, or the draft in the hands of the drawer after acceptance—a state of things out of the ordinary course of business—and the defense was interposed by the indorser or acceptor; while here the only person who should have the draft is the payee, who does have it, and does assume to transfer it.

III. If the foregoing positions are correct, viz., 1. That the plaintiff is an innocent holder; 2. That it became such for a valuable consideration; the firm of Bradner & Carroll, and each member of it, is bound. It is doubtless true that the execution of the draft in question by Carroll, without the consent of his co-partner, for the accommodation of Lowrey,

would be inoperative to uphold it against the firm while in the hands of Lowrey. But it is equally true, and as well settled as any principle or rule of law, that if a co-partner of a mercantile firm affixes the partnership name to paper in which the firm has no interest, and such paper is negotiated to an innocent holder for a valuable consideration, the firm is bound. (*Bank of Genesee* v. *Patchin Bank*, 13 *N. Y. R.* 315. *Gansevoort* v. *Williams*, 14 *Wend.* 133. *Catskill Bank* v. *Stall*, 15 *id.* 364. *Evans* v. *Wells*, 22 *id.* 524, *Walworth, Ch. p.* 333.)

T. R. Strong, for the defendants. I. The signature of Bradner & Carroll on five pieces of blank paper, was given by Carroll to Daniel Lowrey, one of the firm of Lowrey, Strang & Co., under an arrangement between Carroll and Daniel Lowrey that they might be filled up as drafts for $2000 each—the whole not to exceed $10,000—and on one of those pieces of paper is the draft in question. The signature was lent for the accommodation of Lowrey, Strang & Co., and for their use.

II. Before the draft in question was filled up or used, Carroll gave notice to Daniel Lowrey that he must not use the same, and he promised not to do so; and Carroll never afterwards gave him authority to use it. The filling up and use of the draft was therefore without the authority, and contrary to the directions of Carroll, and in violation of the promise of Daniel Lowrey to Carroll not to use it; hence the filling up and use was a forgery. It was also a forgery because it was filled up and used for $17,000, when by the arrangement it was to be for a less sum. (*Van Duzer* v. *Howe*, 21 *N. Y. Rep.* 531.) It is manifest from the testimony of Russell, the financial officer of the plaintiff, that the blank was not filled until at or about the time the plaintiff received it. It was filled up to correspond in amount with the seven drafts the plaintiff then held of Daniel Lowrey or Lowrey, Strang & Co., and evidently for the purpose

of collateral security for those drafts, in pursuance of an arrangement then made. The time of its receipt was between the 19th and 29th of March, 1862. The signatures were given by Carroll about the middle of March.

III. The signature was given by Carroll for the purpose aforesaid, the blank was filled, and the draft issued by Daniel Lowrey, without the knowledge or authority of Bradner; and he never assented thereto. This was not only out of the scope of the partnership business in which Bradner & Carroll had been engaged, but it was after the dissolution of the partnership, and after notice to Daniel Lowrey of the dissolution; hence Bradner is not liable on the draft unless the plaintiff is a bona fide holder. Carroll could not, without the consent of Bradner, impose a liability on Bradner & Carroll, as sureties for Lowrey, Strang & Co., even during the partnership, much less after the dissolution. In *Laverty* v. *Burr*, (1 *Wend.* 529,) Burr indorsed the firm name of Burr & Baldwin upon Allen's note, given to the plaintiff for a debt of Allen. The court say, "The partner who did not sign the note is not bound by it under such circumstances unless he was previously consulted and assented to the transaction; and the burden of proving that the partner who did not sign the note, consented to be bound, is thrown on the creditor. (*See also Ganscvoort* v. *Williams*, 14 *Wend.* 139; *Wilson* v. *Williams*, *Id.* 156; *Joyce* v. *Williams*, *Id.* 141; *Stall* v. *Catskill Bank*, 18 *id.* 469: *see further authorities cited under next point.*)

IV. The plaintiff is not a bona fide holder of the draft so as to preclude the defendants Bradner & Carroll from setting up against it their respective defenses against any claim upon the draft, or in respect to it, by Daniel Lowrey, or Lowrey, Strang & Co. 1. The plaintiff received the draft from Daniel Lowrey, knowing at the time the fact that he was a member of the firm of Lowrey, Strang & Co. He is payee, and one of the drawers and acceptors, and himself wrote the acceptance in the name of that firm. This charges the plain-

tiff with notice that the draft was made for the accommodation of Lowrey, Strang & Co.; that Bradner & Carroll were mere sureties for that firm, and imposes upon the plaintiff the burden of proving the assent of Bradner to such use of the firm name. (*Bank of Rochester* v. *Bowen*, 7 *Wend.* 158.) Bowen procured the indorsement of Aldrich & Searle upon his note, the indorsement being made by Aldrich; Bowen procured the note to be discounted by the plaintiff for his own benefit. Held, that presenting the note for discount by the maker, was notice to the bank that Aldrich & Searle were accommodation indorsers, and that Searle was not liable without proof of his assent. (*Brown* v. *Tuber*, 5 *Wend.* 566.) The drawee had possession of the note; this fact warranted the inference that the defendant's indorsement was for his accommodation. (*See also Boyd* v. *Plumb*, 7 *Wend.* 309; *Livingston* v. *Roosevelt*, 4 *John.* 272; *The Bank of Vergennes* v. *Cameron*, 7 *Barb.* 143, 150.) In the case of *Stall* v. *Catskill Bank*, (18 *Wend.* 469,) the court holds this language: "If the drawer of a note carries it to the bank to get it discounted on his own account, or transfers it to a third person with the name of a firm indorsed thereon, the transaction on its face shows it is a mere accommodation indorsement, or the note would not be in the hands of the drawer; and the bank or person who receives it from the drawer, being thus chargeable with notice that the firm are mere sureties of the drawer, and that it has not passed through their hands in the ordinary course of partnership business, the members of the firm who have been made sureties without their consent are not liable to such holder of the note." Daniel Lowrey could not maintain an action at law to enforce the draft. He is, upon its face, both debtor and creditor. For the same reasons the plaintiff is chargeable with notice that the firm of Bradner & Carroll had been dissolved before the making of the draft, and of the facts stated in the second point; and the burden is imposed upon the plaintiff of avoiding their force. The acts of Dan-

iel Lowrey, in his transactions with the plaintiff, are not, nor would even his express declarations be evidence to affect the rights of Bradner or the position of the plaintiff in regard to him. (*Gansevoort* v. *Williams*, 14 *Wend.* 135. *Elliott* v. *Dudley*, 19 *Barb.* 326.) The cases cited are directly in point to this position. 2. The plaintiff received the draft as collateral security to a prior indebtedness of Daniel Lowrey and Lowrey, Strang & Co. It is submitted that it is apparent from the testimony of Mr. Russell that this was in substance and effect the transaction, and the whole of it. No money was paid, or value parted with. Receiving the draft as security was not a parting with value. (*Coddington* v. *Bay*, 20 *John.* 637. *Stalker* v. *McDonald*, 6 *Hill*, 93. *Youngs* v. *Lee*, 2 *Kern.* 551.) 3. Assuming that the draft was received by the plaintiff under an arrangement to give time upon the other drafts held by the plaintiff, until the former should mature, it does not constitute that valuable consideration which the law required, to make the plaintiff a bona fide holder. The seven drafts unsatisfied, then held by the plaintiff, were to mature from the 12th of April to the 4th of May; the draft in question was payable in ninety days from February 6, and would mature the 10th of May. Less than a month's time was to be given upon either of the prior drafts; and there is no evidence or suggestion that any prejudice has resulted to the plaintiff from giving time. A holder can claim protection from the defense of a party to his negotiable paper as against other parties only when he has parted with some value, or suffered some injury on the faith of it. When he will lose no right which he had when he obtained the paper, and will be fully reinstated if he fails to recover, he is not a holder for value, and the equities of the maker will be preferred. (*Cardwell* v. *Hicks*, 37 *Barb.* 458.) Here no value has been parted with, no injury suffered. In *Wardell* v. *Howell*, (9 *Wend.* 170.) a note at three months was transferred to apply, *when paid*, on a precedent debt, in consideration of the creditor's stop-

ping a suit for that debt, the debtor paying the costs. It was decided that the holder of the note was not a holder for value. The court say the discontinuing of the suit, and the prior indebtedness, were a good consideration for the transfer of the note, but that they did not "constitute that valuable consideration which the policy of the law requires" to make a party a bona fide holder. (*See Francia* v. *Joseph*, 3 *Edw. V. Ch. Rep.* 182, 184.) In *Wardell* v. *Howell*, there was an implied agreement to give time on the debt then due, during the running of the note in question, which was three months. The case seems to be decisive of the present. (26 *N. Y. Rep.* 450.)

V. When money or value is paid in good faith, in the usual course of business, for negotiable paper, the holding is bona fide only to the extent of the money or value paid. (*Ayrault* v. *McQueen*, 32 *Barb.* 305. *Youngs* v. *Lee*, 2 *Kern.* 551. *Edwards* v. *Jones*, 7 *C. & P.* 633. *Edw. on Bills*, 373, *n.*) Upon the same principle, if in this case the plaintiff could be a bona fide holder for value by reason of the facts proved, he could be so only to the amount of the loss which he would sustain by restoring him to his original position. And it can not be seen that any loss would accrue to him. There is no good reason for preferring the plaintiff to the equities of the defendants, to a greater extent. The burden was upon the plaintiff to show that he would be prejudiced by giving the equities of the maker priority; also in view of the circumstances of the making of the draft by Daniel Lowrey, that it is a bona fide holder. (*Case* v. *Mechanics' Banking Association*, 4 *N. Y. Rep.* 166.)

By the Court, JAMES C. SMITH, J. It appears from the evidence that the plaintiff received the draft in suit from Lowrey, the payee, knowing at the time that he was a member of the firm of Lowrey, Strang & Co., the drawees and acceptors. The defendants insist that these facts charge the plaintiff with notice that the draft was made for the accommodation of

Lowrey, Strang & Co., and that Bradner & Carroll, the drawers, were mere sureties for that firm, and impose upon the plaintiff the burden of proving the assent of Bradner to such use of the firm name. I think this position can not be maintained. The payee, being in possession of the draft, is presumed to hold it for his own use and benefit, and the draft, like other ordinary bills of exchange, imports a debt due from the drawees to the drawers, which is assigned to the payee. It is true that Lowrey, the payee, could not maintain an action at law against the acceptors, Lowrey, Strang & Co., of which firm he was a member, but that is only by reason of the technical legal rule that a man can not sue himself. (2 *Bos. & Pul.* 120.) There can be no doubt that a partnership may be indebted to one of the firm, and may bind themselves to him by note or bill; and that though the payee can not enforce the obligation at law, yet he may have relief in equity, (1 *Story's Eq. Jur.* §§ 679 *to* 682,) and his indorsee may recover at law. (*Smith* v. *Lusher*, 5 *Cowen*, 688. *Temple* v. *Seaver*, 11 *Cush.* 314.) The authorities cited by the defendants' counsel upon this branch of the case do not sustain his position.

A question of more difficulty and importance is, whether the plaintiff is a holder for *value*. At the time when the bank received the draft in suit, which was between the 19th and 29th days of March, it held nine other drafts, previously discounted by it, seven of which, amounting to $17,000 were drawn by Lowrey, on Lowrey, Strang & Co., and accepted by them, and the other two, amounting to $4000, were drawn by Bradner & Carroll, on Lowrey, Strang & Co., to the order of Lowrey, and accepted by the drawees. Of these nine drafts, one was to mature on the 29th of March, one on the 9th of May, and the others on different days between those dates. The draft in suit was transferred to the plaintiff as collateral security for the payment of the nine drafts above mentioned, and the plaintiff, in consideration of such transfer, expressly agreed that it would not sue Lowrey,

or Lowrey, Strang & Co., upon either of said drafts, until the maturity of the draft thus transferred. The judge, at the circuit, held that this agreement for forbearance was a valuable consideration within the meaning of the rule protecting the holder of negotiable paper; and I am of opinion the decision is correct. It is insisted by the defendants, that as the plaintiff received the draft as collateral security to a pre-existing debt, it is not a holder for value according to the law as settled by the adjudications of the courts of this state. As I understand the numerous reported cases bearing upon this question, they establish the following propositions: (1.) The holder of commercial paper, who has received it for an antecedent debt, either as a *security* for payment, or as a *nominal* payment, without parting with any security, property or other thing of legal value, or giving any new consideration, is not a holder for a *valuable* consideration. (*Coddington* v. *Bay*, 20 *John.* 637. *Stalker* v. *McDonald*, 6 *Hill*, 93. *Farrington* v. *Frankfort Bank*, 24 *Barb.* 554.) (2.) If, however, he has paid value for the paper, or on the credit thereof has relinquished some available security or valuable right, or has expressly assumed some new legal obligation, he is a holder for value, although the paper is available to him as security for a pre-existing debt. (*Bank of Salina* v. *Babcock*, 21 *Wend.* 499. *Bank of St. Albans* v. *Gilliland*, 23 *id.* 311. *Bank of Sandusky* v. *Scoville*, 24 *id.* 115. *Mohawk Bank* v. *Corey*, 1 *Hill*, 513. *Youngs* v. *Lee*, 18 *Barb.* 187. *S. C. affirmed*, 2 *Kern.* 551. *White* v. *Springfield Bank*, 3 *Sandf. S. C. R.* 222. *Meads* v. *The Merchants' Bank*, 25 *N. Y. Rep.* 143.) Tested by these rules, the agreement of the plaintiff to give time upon the drafts held by it was clearly a valuable consideration. Not only was it a *valid* consideration to support the transfer, but it created a new equity between the original parties, and as it suspended the legal remedy of the plaintiff, the latter could not be restored to as good condition as it was in before the transfer. It operated like a new loan of the sums due upon

the drafts, until the maturity of the new security. The transaction was substantially the same as if the old drafts, to the amount of $17,000, had been paid and canceled, and the sum paid had been loaned upon the new draft. Although the plaintiff did not give up the old drafts, it parted with its right of action upon them until the maturity of the new one, and assumed the risk of loss by the insolvency of Lowrey and his firm, in the meantime. And if the agreement to give time included the drafts drawn by Bradner & Carroll, they were thereby released from their obligation upon such drafts, as, on the face of the paper, they were sureties for the acceptors, and it does not appear that they consented to the extension.

The defendants' counsel cites *Wardell* v. *Howell*, (9 *Wend.* 170,) and *Francia* v. *Joseph*, (3 *Edw.* 182,) as authorities for the position that the agreement to give time does not constitute a *valuable* consideration. But I think they are not decisive of the question. In *Wardell* v. *Howell*, the plaintiffs had sued one Hughes on a note for $178. Hughes offered the plaintiffs that if they would stop the suit, he would pay the costs, and turn out a note in his possession indorsed by the defendants, for $150, as collateral security for the note they held against him. The plaintiffs acceded to his proposition; he paid the costs and delivered the note in question to them, and they gave him a receipt acknowledging that they had received the note, which, *when paid*, was to apply on their note against him. There was no express agreement to extend the time of payment; and none could be presumed, as the agreement was merely that the note should take effect as *security*. (11 *Wend.* 320. 1 *Bosw.* 411.) It would have been otherwise, perhaps, if the parties had intended the note to operate as a conditional *payment*, at the time *of the transfer;* (5 *Hill*, 463; 3 *Denio*, 512; 2 *Am. L. Cas.* 420;) but, by the terms of the receipt, it was not to be applied until paid. This view of the case was undoubtedly taken by the court. Justice Sutherland, deliv-

ering the opinion, said that the prior indebtedness of Hughes, and the discontinuing the suit against him, did not constitute a *valuable* consideration against the indorser, under the circumstances of the case. But he did not suggest that there was an agreement to extend the time, express or implied; nor is there an allusion in the case to the effect of such an agreement by way of constituting a valuable consideration in the sense of the commercial rule. The case of *Francia* v. *Joseph* was decided by Vice Chancellor McCoun, so far as this point is concerned, mainly upon a misapprehension, as I conceive, of the ruling in *Wardell* v. *Howell*. The decision is entitled to great respect, but as it stands alone, and is not binding upon this court at general term, we may properly consider the question as an open one.

The plaintiff is to be regarded as a holder for value to the full amount of the draft in suit. As has already been observed, it assumed by its agreement the risk of loss by reason of all the parties to the drafts becoming insolvent during the period for which the credit was extended. If such insolvency had occurred, the bank would be regarded as having paid the full amount of the draft. The result is the same if the transaction is treated as a payment of $17,000 upon the original drafts, and a loan of that amount upon the draft in suit.

I am of opinion the motion for a new trial should be denied.

Ordered accordingly.

[Monroe General Term, December 5, 1864. *J. C. Smith*, *Welles* and *E D. Smith*, Justices.

43 395
130a 597
43 395
44 197
44a 232

TERRY, receiver, &c., *vs.* BUTLER and others.

Where, in an action to set aside an assignment of property in trust for the benefit of creditors, the referee found as a fact that at the time of the execution of the assignment the assignor was in possession of all the property therein referred to, and had ever since continued in possession thereof; and that there was no delivery of it, or change in its possession; *Held* that this alone, in the absence of proof that the assignment was made in good faith, and without any intent to defraud creditors, authorized the conclusion of the referee, that the assignment was fraudulent and void, as against creditors.

The parties to an assignment must be deemed to have executed it in view of the provisions of chapter 348 of the Laws of 1860, p. 594, which require that every debtor making an assignment in trust for creditors shall, at the date thereof, or within twenty days thereafter, make and deliver an inventory or schedule of his creditors and debts.

The inventory, although not prepared until several days after the assignment is executed, is of the same effect as if it was made on the same day. And when completed, it is to be treated as if it had been expressly referred to in the assignment, as a schedule thereafter to be made; and is to be regarded as a part of the assignment, so far as it designates the creditors, and the amount and nature of their debts.

Hence it is not erroneous for a referee to find that debts embraced in the inventory are provided for in the *assignment*, although not expressly mentioned therein; and if such debts are of a fictitious character, the assignment is void.

In equity the separate estate of partners is not liable for partnership demands, until the partnership effects are exhausted and the separate debts are paid.

An order appointing the plaintiff receiver of the property of B. a judgment debtor, was founded on a demand owing by P. & B. as copartners. The property in the hands of their assignees, and which the latter were directed by the judgment to transfer to the plaintiff, was the separate property of B. The judgment also directed the receiver to apply the avails of said separate property to the payment of the said copartnership demand. *Held* that the judgment was erroneous, in the absence of any evidence that the separate debts of B. had been paid.

THIS action was brought by the plaintiff, as receiver of Benjamin Butler, a judgment debtor, to set aside as fraudulent a general assignment of his property, made by him to Gallery & Bassett, in trust for the benefit of creditors. The judgment upon which the plaintiff was appointed receiver was recovered by the Traders' Bank of Rochester,

upon a copartnership note made by the copartnership firm of Putnam & Butler, of which Benjamin Butler was a member. The case showed that on the 26th of August, 1861, the defendant Butler, being insolvent, made an assignment of all his individual property, in trust for the payment of his individual debts. The assignment provided for the payment of certain specified debts, which were proved to be valid, and then directed the payment of all other debts legally owing by the assignor. Butler, on the 28th of May, 1860, had executed a mortgage to Patrick Quinn for $2500, on which $800 was due. On the 19th of December, 1860, he had executed another mortgage, to the same person, for $2750, on which nothing was due. Neither of these mortgages was mentioned or referred to, in the assignment. At the time of executing the assignment no inventory was made or contemplated by Butler; he not then knowing that an inventory was necessary. On the 12th day of September, 1861, Butler, with the assistance of one of the assignees, prepared an inventory of his debts and assets, in which he inserted the Quinn mortgages, for the whole amount, as debts owing by him. Neither of the assignees had any knowledge whatever, in regard to these mortgages. The assignees sold a part of the personal property, and were proceeding to sell the real estate when stayed by injunction, in this suit. The referee found that the Quinn mortgages were provided for in the assignment, and for that reason, and that alone, held the assignment to be fraudulent and void, and directed the assignees to convey all the assigned property to the plaintiff, and that the judgment described in the complaint be paid therefrom. Judgment being entered, upon the report, Butler and the assignees appealed.

J. C. Cochrane, for the appellants.

Geo. F. Danforth, for the respondent.

By the Court, JAMES C. SMITH, J. The argument of the appellants' counsel upon that branch of the case which relates to the validity of the assignment may be resolved into two propositions: first, that the conclusion of the referee that the assignment is fraudulent and void as against creditors, has nothing to support it except the fact found by him that the fictitious debt to Quinn was fraudulently provided for in the assignment; and secondly, that such finding of fact is against the evidence furnished by the assignment itself.

The first of these propositions overlooks the fact found by the referee, that at the time of the execution of the assignment, the assignor "was in possession of all the property therein referred to, and has ever since continued in possession thereof, and that there was no delivery of it, or change in its possession." This fact, alone, in the absence of proof that the assignment was made in good faith, and without any intent to defraud creditors, authorized the conclusion of the referee.

In regard to the second proposition, it is true that the instrument of assignment, which was executed on the 26th of August, did not in terms provide for the payment of the Quinn mortgages. It did provide, however, for the payment, first, of certain debts therein specified, and secondly, of "*all other* debts legally owing" by the assignor, which latter debts were not specified. The parties to the assignment must be deemed to have executed it in view of the provisions of chapter 348 of the Laws of 1860, (p. 594,) which require that every debtor making an assignment in trust for creditors shall, at the date thereof, or within twenty days thereafter, make and deliver to the county judge, &c., an inventory or schedule containing, among other things, a full and true account of all the creditors of such debtor, the sum owing to each, and the true cause and consideration of each debt. The referee found that on the 12th of September the assignor, with the aid of Bassett, one of the assignees, prepared and verified an inventory which was presented to the judge and

filed, as required by said act, in which the Quinn mortgages were stated as debts owing by the assignor, to the amount of $5200. The referee also found that for all over $800 said mortgages were without consideration and were fictitious; and that the excess over $800 was fraudulently inserted in the inventory. In view of these facts and the provisions of the statute referred to, it seems to me that the inventory is to be regarded as a part of the assignment, so far as it designates the creditors of the second class, and the amount and nature of their debts, especially as in respect to those points the assignment itself is silent. Although the inventory was not prepared until the 17th day after the assignment was executed, it is of the same effect as if it was prepared at the date of the assignment. (*Sec.* 2 *of the act.*) And although it is a separate instrument, yet as the assignor was required by law to prepare it, in order to make his assignment complete, I think it is to be treated as if it had been expressly referred to in the assignment, as a schedule thereafter to be made, of the creditors provided for in the second class. When it was made and filed it clothed the debts therein specified with *apparent* legal validity, and entitled them to be paid according to the provisions of the assignment; and I apprehend if the assignees, relying upon the statement in the schedule, had paid such debts in good faith, without knowledge of their fictitious character, they would have been protected in so doing. These views do not militate against the well established doctrine relied upon by the appellants' counsel, that upon the execution and delivery of a general assignment in trust for the benefit of creditors, the rights of the parties to it are fixed, and the creditors provided for acquire rights which neither the assignor nor the assignee can thereafter change. The schedule changed no rights under the assignment. It merely supplied an omission in that instrument by designating the creditors who were embraced in the second class.

If these views are correct, it follows that the finding of

the referee that the Quinn mortgages were provided for in the *assignment*, is not unauthorized.

But there is another branch of the case, in respect to which a serious difficulty exists, which does not seem to have been adverted to before the referee, and which requires a reversal of the judgment. The order appointing the plaintiff receiver was founded on a demand owing by Putnam & Butler as copartners. The property in the hands of the assignees, and which they are directed by the judgment herein to transfer to the plaintiff, is the separate property of Butler. The judgment also directs the plaintiff as receiver to apply the avails of said separate property to the payment of the said copartnership demand. In this respect I think it is erroneous. In equity, the separate estate is not liable for partnership demands, until the partnership effects are exhausted, and the separate debts are paid. In the case at bar it appears sufficiently, perhaps, that the remedy at law against the partnership property has been exhausted by the proceedings had in the legal action against Putnam and Butler set forth in the complaint and admitted on the trial. It is true the summons in that action was not served on Putnam, he being absent from the jurisdiction of the court; but he was named a party defendant; the judgment was entered against the defendants jointly, as it properly might be, (*Code*, § 136,) and the execution was regularly issued against their joint property, as well as the separate property of the defendants served. (2 *R. S.* 377, §§ 3, 4. *Code*, § 291.)

But there is no evidence that the separate debts of Butler have been paid. The assignment, which was given in evidence by the plaintiff, shows that at the time of its execution Butler was owing individual debts to the amount of several thousand dollars, which he was unable to pay, and which, for aught that appears, are yet outstanding. As the judgment makes no provision for the payment of the separate debts, but in effect postpones them till the plaintiffs' claim against the firm is satisfied, out of the separate estate,

instead of directing payment of the plaintiffs' demand out of the *surplus* if any remains after payment of the separate debts, it is therefore erroneous and must be set aside, and a new trial must be had.

Ordered accordingly.

[Monroe General Term, December 5, 1864. *J. C. Smith, Welles* and *E. Darwin Smith*, Justices.]

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43 400
13h 621
15h 493
22h 399
41a 620

Wolf *vs.* The Goodhue Fire Insurance Company.

It is an intendment of the law that a verdict settles in favor of the prevailing party every question of fact litigated upon the trial.

Courts are not to intend that the jury found either of the issues in favor of the unsuccessful party, for the purpose of overturning their verdict. On the contrary, they are required to hold that every issue was found against the unsuccessful party, if necessary to sustain the verdict.

But if the jury gave the plaintiff less than he was entitled to recover, upon the finding of the issues, that is an error of which the plaintiff, alone, can complain. If he submits to the verdict, the defendant can not be heard to insist that it shall be set aside because it is unjust to the plaintiff.

Where, in an action upon a policy of insurance, the defenses are that the insured set fire to the property himself, and that he was guilty of fraud and perjury in preparing the preliminary proofs, the fact that the plaintiff recovers a verdict for a sum less than the amount insured and claimed to be recovered, will afford no evidence that the jury meant to decide the issue of fraud against the plaintiff.

ACTION upon a policy of insurance. On the 18th day of April, 1860, John Englehardt procured from the defendant a policy of insurance upon his stock of watches, clocks, jewelry and tools to the amount of $900, and upon his fixtures, show cases and furniture, to the amount of $100. There was another policy upon the same goods, for $1000, issued at the same time by the Security Insurance Company. On the 16th of May, 1860, Englehardt executed a bill of sale of the property insured, to Charles Stupp, who, on the same day, executed a bill of sale of the same to Margaretta

Englehardt the wife of the insured. On the 7th day of July, 1860, the policy of insurance in question was, with the defendant's assent, assigned by John Englehardt to Margaretta his wife. On the 24th day of March, 1861, a fire occurred on the premises in which was the insured property, and by which, as was alleged, a loss occurred, within the terms of the policy. On the 27th day of April, 1861, John Englehardt and his wife prepared, signed and verified preliminary proofs of loss, and served the same upon the defendant. In these proofs they alleged, among other things, that the actual value of the goods insured, at the time of the fire, was $3116.42.

Value of the goods totally destroyed thereby,	$2933.94
Damage to property not totally destroyed,	107.42
	$3041.36

A schedule, marked A., formed a part of such proofs of loss, and was referred to as containing in detail a statement of the property "destroyed and damaged by fire, covered by the defendant's policy, and giving the cash value of said property at the time of the fire, and the loss and damage thereon."

On the 8th day of July, 1861, John and Margaretta Englehardt assigned all their claim under the policy, to the plaintiff, by an instrument which recited a consideration of $1000 for the same. The complaint alleged the issuing of the policy; the various assignments thereof and of the property: "that on or about the 24th day of March, 1861, the said property, so insured, was damaged and in part destroyed, to the amount of $3000, by fire;" and the necessary steps taken to charge the defendant; and claimed damages for the whole sum covered by the policy. The answer, among other matters, alleged as a defense, fraud and perjury committed by the Englehardts in the preparation of the preliminary proofs; first, as to the value of the property; and second, as

to the amount of the loss. The issues thus joined were brought to trial before the Hon. E. DARWIN SMITH and a jury, at the Monroe circuit, in January, 1864. The plaintiff introduced in evidence the policy sued on, and the conditions thereto attached, one of which was, "That all fraud or false swearing shall cause a forfeiture of all claims on the insured, and shall be a full bar to all remedies against the insurer, on the policy."

The jury found a verdict for the plaintiff for	$412 27
Deducting interest from 27th June, 1861, to day of trial, July 15, 1864,	74 74
Leaves half of the value of the whole property as the jury found,	$335 83
Or twice this, the whole value as found by the jury,	675 06

The defendant, at a special term held by the learned judge who presided at the circuit moved to set aside the verdict, and for a new trial, on the ground that the verdict was against evidence, and contrary to the charge of the court. The motion was granted, for the reasons stated in the following opinion; which is inserted here as expressing the grounds of Judge SMITH'S dissent to the decision of the general term, upon the appeal.

E. DARWIN SMITH, J. "The verdict in this case is entirely unwarranted by the evidence. The defense was double: 1st. That there was fraud in making the preliminary proofs; and 2d. That the fire originated by design or procurement on the part of the insured. There was evidence on the latter point, which was conflicting, and the verdict of the jury for the plaintiff, on that issue, can not be disturbed.

On the first issue there was much evidence tending to establish the fraud, and the jury were instructed that if any fraud or perjury was committed in making proof of the loss by the insured, or otherwise, the defendant would be entitled to a verdict.

The insured in making out her statement of loss, in the preliminary proofs, stated the value of the property consumed by the fire to be of the value of $3116.42, which statement was verified by her oath. The jury, by their verdict, have found in effect that there was nothing like that amount in value of property in the store, at the time of the fire. By this verdict they must have assessed the whole value of the property consumed by the fire at about $600. So great a discrepancy between the amount claimed and asserted upon her oath by the assured to have been in the store at the time of the fire, and the amount found by the jury to have been there and consumed by the fire, can not be explained on the ground of, or set down to, mere mistake. It was a palpable fraud, at least, on the face of the transaction. When the jury came to the conclusion that the value of the property consumed by the fire did not exceed $600, or thereabouts, they could not, as I think, upon any rational basis, render a verdict for the plaintiff. They might and should overlook any slight error or misstatement, any error which was clearly the result of accident, mistake or misconception, and they were so instructed. But a claim sworn to, of damages sustained from the fire, so much in excess of the fact, could not be accounted for, except on the ground of "willful and deliberate fraud and misrepresentation." A verdict should be consistent with the law of the case, and with the charge. Juries have no right to render capricious or arbitrary verdicts in disregard of the charge of the court and the clear facts of the case. A verdict must rest upon some sound principle, and be consistent with some legitimate theory of the facts, and under the charge. Juries are too apt to render compromise verdicts perfectly inconsistent upon their face, and this I conceive to be such a verdict. Courts must see that the verdict is warranted by some logical interpretation of the evidence. This verdict is in the nature of a *felo de se.*

If the plaintiff had satisfied the jury that the value of the

insured property approximated to the sum stated in the affidavit of the insured; that it was so nearly up to that amount that the insured might honestly have over estimated it, the jury might properly have found a verdict for the plaintiff upon such assumption. But this is not such a verdict. The jury who have tried this cause could not, I think, upon the evidence, have stultified itself so much as to have found that the property consumed by the fire was worth $2000, or $1000. The over valuation was too palpably excessive and extravagant for any finding that such value was any thing near $3000. When they came, therefore, to the conclusion that the amount claimed by the insured was so much in excess of the truth, they were bound to follow such finding to its legitimate result or conclusion, and should, I think, have rendered a verdict for the defendant, upon this issue.

The verdict, I think, ought therefore to be set aside for the error in this case, and for example sake, that jurors may be instructed and required to render rational and proper verdicts in accordance with the legitimate force and requirements of the evidence. There is no safety in jury trials, upon any other theory. I regret very much the necessity for setting aside this verdict, because the trial was a protracted one; and it is much to be regretted that a new trial should be had in it, in the present state of the calendar in Monroe county. But this consideration ought not to be allowed to induce the court to sanction such a verdict, or to refrain from granting a new trial.

The proper administration of public justice, which it is my duty to seek to secure and preserve, requires, as I conceive, that this verdict be set aside, and that a new trial be granted, upon payment of costs by the defendant; and it is so ordered."

The plaintiff appealed from the order, to the general term.

James C. Cochrane, for the appellant.

Geo. F. Danforth, for the respondent.

JAMES C. SMITH, J. After an attentive consideration of this case, I am of opinion that the order for a new trial should be reversed. The order was made, as appears by the opinion contained in the printed case, upon the ground that the verdict is inconsistent with the belief of the jury in the honesty of the Engleharts, or the absence of fraud or perjury on their part, in the preparation of the preliminary proofs; or, in other words, as the verdict is for only $412.27, it shows conclusively, that the jury believed that the Engleharts fraudulently stated their loss at more than $3000, and therefore the verdict should have been in the defendant's favor. I think, however, this assumption is not absolutely correct. The most that can be claimed is that the verdict establishes one of the following alternative propositions: (1.) That the jury, believing the allegation of fraud to be true, erroneously found for the plaintiff; or (2.) That disbelieving that allegation, they erroneously rendered a verdict for a much less sum than the plaintiff was entitled to recover. If either of these propositions is to be regarded as established by the verdict, it would seem to be the latter, according to the intendment of law that a verdict settles in favor of the prevailing party every question of fact litigated upon the trial. We are not to intend that the jury found either of the issues in favor of the unsuccessful party, for the purpose of overturning their verdict. On the contrary, we are required to hold that every issue was found against the unsuccessful party, if necessary to sustain the verdict. But if the jury gave the plaintiff less than he was entitled to recover, upon the finding of the issues, that is an error of which the plaintiff, alone, can complain. If he submits to the verdict, the defendants can not be heard to insist that it shall be set aside because it is unjust to the plaintiff. The argument on which the defendants' motion for a new trial is based virtually concedes that if the verdict had been for the whole amount insured, it could not have been disturbed; but such

increase would not have affected the character or weight of the *evidence* furnished by the verdict, that the jury believed the allegations of the plaintiff upon *all* the issues, to be true. If upon a new trial the plaintiff should recover a verdict for the whole amount of his insurance, upon precisely the same evidence now before us, it is safe to assume that the verdict would not be set saide. I think, therefore, the order granting a new trial on the application of the defendants should be reversed on the ground that the verdict, by intendment of law, finds all the issues of fact in favor of the plaintiff, and its only error is one which the plaintiff alone can be heard to allege.

But if we could overlook the legal intendment above adverted to, and indulge in speculations as to whether the jury did not in fact decide the issue of fraud against the plaintiff, although they found generally in his favor, I should hold that the defendants' claim in that respect is not established by satisfactory evidence. The amount which the plaintiff claimed to recover was not the entire value of the property destroyed or damaged, nor the one half of it, but simply the amount insured by the defendants' policy, to wit. $1000, with interest, perhaps, in the discretion of the jury. (1 *John.* 315, 406. 23 *Wend.* 525.) Nine hundred dollars of the insurance was on the "stock of watches, clocks, jewelry and tools," and one hundred on the "fixtures, show cases, and furniture." Many of the items set out in the schedule contained in the proofs of loss were not covered by the terms of the policy, as appears by a comparison of the two instruments. It is evident, therefore, that the amount of the verdict does not necessarily indicate the valuation which the jury put upon the entire property destroyed by the fire. It is also to be borne in mind that the property consisted of a variety of articles kept in a retail store, many of them in packages and drawers, out of the view of customers or casual observers, and that most of them were of such a description

that different witnesses might honestly entertain widely differing opinions as to their value. In these circumstances it seems to me we should hardly be warranted in assuming that the excess of the valuation of the articles covered by the policy stated in the proofs of loss over that found by the jury, is of itself conclusive evidence that the former was fraudulently made.

But, to present the case in the most favorable light for the defendants, let it be assumed that the verdict is the result of a compromise of opinions on the part of the jurors; that some of them were of opinion the fraud was established, and others thought it was not, and that the verdict is not what either of them alone would have rendered, and is not, *in amount*, the logical result of any possible findings, is it for that reason to be set aside? It may be the result of a deliberate and unanimous conviction that an agreement upon the extreme ground taken by either of the litigants was impracticable, and that it was far better for them, and for the public interests, to terminate the controversy by the verdict that was rendered, than to prolong it by a disagreement. I am not prepared to say that in a case of unliquidated damages such a mode of reaching a verdict is to be condemned. On the contrary, I am apprehensive that if we send this case down to another jury we shall set a precedent which, if generally followed, will lead to very embarrassing and mischievous consequences. At the same time it is proper for me to say, that while I do not think we should interfere with the verdict, I am not altogether satisfied with it. Probably it is not such a decision as any one of the jurors would have come to, if the cause had been tried before him alone, as a referee. But that is merely saying that a verdict is the result of the deliberations of twelve men, and not of one. If the verdict in this case had been attained by any arrangement among the jurors which made it the result of chance, it of course would not be allowed to stand. But as it is not shown to have re-

sulted from any irregularity, or improper motive, and as it does not violate any rule of law, at least to the prejudice of the defendants who alone seek to get rid of it, I am unable to assent to the order setting it aside.

WELLES, J. concurred.

E. D. SMITH, J. dissented.

Order reversed.

[MONROE GENERAL TERM, December 5, 1864. *Welles, E. Darwin Smith* and *James C. Smith*, Justices.]

BENSON *vs.* SUAREZ.

Where one leases premises to another, covenanting to keep the buildings in repair, and in consequence of his neglecting to repair the same, a shed falls, drawing down with it a building of an adjoining proprietor, and injuring the property of the latter therein, an action will lie against the lessor, to recover the damages.

MOTION for a new trial on a bill of exceptions. The cause was tried at the Albany circuit in November, 1863, before Justice HOGEBOOM and a jury, when the plaintiff recovered a verdict for $500, for damages occasioned by the falling of a building, through the defendant's neglect as alleged.

Henry Smith, for the motion.

Ira Shaffer, opposed.

By the Court, PECKHAM, J. The defendant insists that the judge erred in refusing to nonsuit the plaintiff I do not think so. The defendant was the owner of the tavern

stand and appurtenances where the old shed fell. He had leased them to Finney and covenanted to keep them in repair. He failed to keep this old shed on his premises in repair, and by reason of its being left in a weak and dilapidated condition, it fell down and drew down a shed of the plaintiff adjoining to it and injured his wagons &c. to the amount of the verdict. I am not at all clear that it was necessary to show any covenant to repair by the defendant, in order to sustain this action. "*Sic utere tuo ut alienum non ledas,*" is a sound maxim, and entirely applicable to this case. An owner has no right to erect a nuisance on his own land to the injury of his neighbors. He can not erect so weak and unsafe a building that it shall fall in ordinary times from its mere insecurity and insufficient strength, and thus injure the building or property of his adjoining neighbor, without being responsible for that injury. Nor can he suffer a building on his premises to become so much out of repair as to cause a like injury without being responsible; especially where he had notice of its condition and neglected to repair. Nor can he shield himself from liability, in such case, by charging negligence on his neighbor for presuming to occupy his own lot, in a careful manner, in the face of such danger. What is this but saying to his neighbor, "I have erected an unsafe and dangerous building on my lot, and you must allow your's to lie vacant and unoccupied; otherwise my building may blow down upon you and destroy your property." (*See Cook* v. *The Champlain Trans. Co.* 1 *Denio*, 91; *La Sala* v. *Holbrook*, 4 *Paige*, 173; *Patten* v. *Hollam*, 17 *John.* 92.) I do not think that leasing premises to another, reserving rent with such an unsafe building thereon, discharges the liability of the owner. Whether it does or does not, however, is not material here, as the defendant in this case agreed to keep the building in repair.

It is objected that it was only for hotel purposes that he agreed to keep in repair. That contract fully covers this

case. They were not in sufficient repair for hotel purposes, when they could not stand up in ordinary weather.

I see no error in the charge of the judge. The plaintiff could, no doubt, be in the lawful possession of the premises leased to Finney without any covenant in writing from the defendant, the owner. He was in the actual occupation thereof. He had the consent of Finney, the lessee of the defendant, to be in; he had the actual consent of the defendant to be in, also, but he had no written consent. As to whom then was he a wrongdoer? It is not of the slightest consequence that the lease provided that the lessee should not underlet without the consent in writing of the lessor. This was an action upon the lease, and this plaintiff was no party to the lease. Surely, by the consent of all the parties interested, he could get into the lawful possession and occupation of the premises. He had all that, as the jury have found, and as the evidence proved.

Nor do I think the judge committed any error in refusing to charge as requested; and I think the remarks already made, if correct, show that he could not be required so to charge.

A new trial is denied, and judgment ordered upon the verdict.

[Albany General Term, May 2, 1864. *Peckham, Miller* and *Ingalls*, Justices.]

Elizabeth Niver *vs.* Daniel W. Niver.

In an action for a willful and wrongful injury to the plaintiff's property, and for wrongfully and willfully depriving her of the use of certain parts thereof, the defendant is liable to be arrested and imprisoned upon execution.

THIS was an appeal from an order made at a special term refusing to set aside a ca. sa. issued against the defendant.

A. B. Voorhees, for the motion.

Ira Shafer and *J. Lawton*, opposed.

By the Court, Peckham, J. The motion is made upon the ground that the defendant is not liable to be imprisoned upon an execution in this case. The complaint is for a willful and wrongful injury to the plaintiff's property which she obtained under the will of her father, and for wrongfully and willfully depriving her of the use of certain parts of such property. The complaint sets forth the will of her father, the injuries complained of, and then asks that the rights and interests of the parties to this action under said will, (the defendant, her brother, being a devisee therein,) may be adjudged and determined; that the defendant may be required to remove certain obstructions he had interposed to her proper use of her property; that an injunction issue against him, enjoining him from interfering therewith, and for judgment for an injunction and for damages to $500 for the said injuries, &c.

The complaint sets up no alleged doubt or difference between the parties as to their true rights under said will; it presents no question of doubt, and it makes no allegation that the defendant did what he did under a claim or pretense that he had the right so to do under said will. On the contrary, all the allegations on that subject are that he did the

wrongs willfully, wrongfully and illegally. The gravamen of the action is the wrong done to the plaintiff's property. There is but one count, and that asks redress for past wrongs and protection for the future. *Lambert* v. *Snow*, (17 *How.* 517,) has no application to such a case. There, there were two distinct causes of action, for one of which the defendant could be held to bail and not for the other. Here are not two causes of action. The action is substantially for injuries; willful injuries to the plaintiff's property.

Nor have the other cases cited by the defendant's counsel any legitimate bearing here. (32 *Barb.* 83. 1 *Hill*, 225. 7 *id.* 182. 2 *Cowen*, 282.) This case comes within the plain provision of the code (§ 179) for injuring property.

The order appealed from is affirmed, with $10 costs.

[Albany General Term, December 5, 1864. *Peckham*, *Miller* and *Ingalls*, Justices.]

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43 412
92a 75

Dubois and others, executors, &c., *vs.* Sarah E. Sands, guardian, and others.

Although the surrogate's court is one of special and limited jurisdiction, and can only exercise such power as the statute confers, yet the authority to do certain acts, or to exert a certain degree of power, need not be given in express words, but may be fairly inferred from the general language of the statute; or, if it be necessary, to accomplish its objects, and to the just and useful exercise of the powers which are expressly given, it may be taken for granted.

The surrogate being authorized by the revised statutes to direct and control the conduct, and settle the accounts, of executors and administrators; to enforce the payment of debts and legacies; and to administer justice in all matters relating to the affairs of deceased persons according to the provisions of the statutes of this state; he has ample authority to compel executors to perform their duty by expending, for the benefit of infant legatees, the interest of a sum of money intrusted to them for that purpose, by the testator.

Dubois *v.* Sands.

IN March, 1861, Richard Dubois, of Ulster county, New York, died, leaving among other children Sarah E. Sands, the respondent, and three grandchildren, Ann Eliza, Mary Ellen and John D., the children of his aforesaid daughter, and leaving a will which was admitted to probate by the surrogate of the county of Ulster, September 22, 1862, bequeathing to said grandchildren the sum of $1800, to be paid to them or the survivor or survivors on their marrying, or arriving at the age of twenty-one years. The executors were directed to expend for the benefit of said children the interest of said legacy, yearly, as their necessities should require. Ann Eliza is dead. John P. Dubois and others were appointed executors by said will.

On the 19th of December, 1863, Sarah E. Sands, the respondent, was duly appointed by the surrogate of New York county the general guardian of the said Mary Ellen and John D. Sands, and subsequently demanded of the said executors the income of the legacy given to her children, which they refused to pay.

A citation was issued by the surrogate of Ulster county, requiring the executors to account and pay over the legacy. After a contest and hearing of the parties, in which the executors admitted a sufficiency of assets, the surrogate decreed the payment of the interest of said legacy, at the rate of six per cent, into the surrogate's court for the benefit of said minor children. From said decree the executors appealed. The points material to be considered are discussed in the opinion.

W. Farrington and *H. A. Nelson*, for the appellants.

A. G. Hull and *D. Ketchum*, for the respondents.

By the Court, MILLER, J. I think that the question put to the petitioner, when examined as a witness, as to whether her father had money in his possession belonging to her at

the time the advancements were made for the children, and whether those advancements were made out of her own money, was a proper one and admissible. The petitioner was not examined on her own behalf, but on behalf of the infant legatees whom she represented, and was a competent witness to the facts testified to by her, under section 399 of the code; and the evidence was not within the prohibition therein contained.

The evidence offered to prove that the deceased deposited the amount of the legacy in the savings bank, and so declared at the time of making the deposit, was not admissible. It involved a verbal declaration of the deceased which was not competent to contradict or to control the written provisions of the will. Even if admitted, I do not discover that it would have had any very material or important bearing upon the subject matter of the proceedings.

I see no objection to the form of the decree in requiring the interest to be paid up to the date of the decree. Nor is it of any consequence that the decree does not provide for commissions to the executors. These can be allowed upon a final accounting, and there is nothing to show that they were claimed on the hearing. No exception appears to have been taken to the decree on this account, or in consequence of the provision as to the time when the interest should be computed, and perhaps it is too late to urge these points now.

As the executors had not paid over the interest, as required by the will, I am inclined to think that costs were properly chargeable against them. There was some evidence to show a request to pay, and as costs are somewhat discretionary in cases of this kind, I do not think that we are authorized to hold, under the circumstances existing, that the surrogate has abused his discretion in this respect.

I also think that the surrogate, in his decree, very properly reserved the question as to the deductions of any advancements and expenditures made by the deceased for the support and maintenance of the infants during his life,

until the determination of the suit in the supreme court. The testimony of Mrs. Sands showed that these expenses were to be deducted from the moneys belonging to her, which the testator had in his possession, and that an action was pending in the supreme court against the executors to recover a balance due her on account of them. Those expenses were a proper offset, and could be deducted from the claim of Mrs. Sands. And if not deducted they would, under the surrogate's decree, be a proper claim in abatement upon the principal or excess of interest, in case the result of said suit should evince that any abatement was proper. In this particular the decree was quite as favorable to the executors as the testimony warranted, and I see no ground of complaint.

This brings me to a consideration of the only question remaining in the case. In behalf of the appellants it is insisted that the surrogate's court did not possess any jurisdiction and that the power claimed and exercised was not among those conferred upon him by law. The surrogate's court is one of special and limited jurisdiction, and can only exercise such power as the statute confers. The authority, however, to do certain acts, or to exert a certain degree of power, need not be given in express words, but may be fairly inferred from the general language of the statute; or if it be necessary to accomplish its objects, and to the just and useful exercise of the powers which are expressly given, it may be taken for granted. (*Seaman* v. *Duryea*, 10 *Barb.* 523. *See also Cleveland* v. *Whiton*, 31 *id.* 546.)

The surrogate is authorized by the revised statutes to direct and control the conduct and settle the accounts of executors and administrators, (2 *R. S.* 220, § 1, *sub.* 3;) to enforce the payment of debts and legacies, (*Id. sub.* 4;) to administer justice in all matters relating to the affairs of deceased persons, according to the provisions of the statutes of this state, (*Id. sub.* 6.) Under and by virtue of these enactments I think there is ample authority to compel the

appellants to perform their duty by expending for the benefit of the testator's grandchildren the interest of the fund which had been entrusted in their hands for that purpose. If they failed to do this as the will provided, (and the evidence upon the hearing established that they had expended nothing for the benefit of these infants,) then there was authority with the surrogate to compel them to execute the provisions of the will. He had the right to direct and control their conduct in this respect, by enforcing the payment of so much of the legacy as remained due and unpaid, and thus "administer justice" in regard to it. It is no objection to compelling payment of the interest as the will provided, that they were intrusted with the expenditure of the money. It is quite sufficient that the executors neglected to expend it as required and directed, to authorize the surrogate to act in the premises and compel them to pay over.

A remedy lies for thus failing to perform a plain and positive duty, and even although the executors might be made liable in an equitable action instituted in the supreme court for that purpose, yet it by no means follows that the surrogate is deprived of jurisdiction. It is obvious that the powers of the surrogate, as defined by statute, were not intended to exclude cases like the one at bar.

The revised statutes, as originally adopted, upon a final accounting, only ousted the surrogate of jurisdiction over the accounts of executors, when the latter were liable to account to a court of equity by reason of any trust *expressly created* by a last will and testament. (2 *R. S.* 94, § 66.) This was subsequently provided for by an amendment of section sixty-six, (*Laws of* 1850, *p.* 587,) which authorized testamentary trustees to settle their accounts before the surrogate, and thus the jurisdiction of the surrogate was enlarged in this respect.

Willard, in his work on *Executors*, at p. 36, after citing the provisions of the revised statutes (*vol.* 2, *p.* 220, § 1) before referred to, employs the following language in regard

to them: "The foregoing specification of powers does not comprise a jurisdiction over express trusts, but leaves them to be executed as formerly by a court having jurisdiction in equity. In one sense every executor *is a trustee* for the legatees and next of kin. Over *ordinary cases of such trusts* jurisdiction is conferred by the foregoing statute. But there are other trusts not there provided for." (*See also Glover* v. *Holley*, 2 *Bradf.* 291.)

Whatever trust may have been created by the testator's will was but an ordinary case of trust, in reference to which the surrogate had jurisdiction. It certainly did not establish an express trust. (3 *R. S. 5th ed.* 16.)

In my opinion the surrogate had power to entertain the proceedings instituted before him, and to make a decree in the premises; and in this respect he has not exceeded his jurisdiction. As no error appears to have been committed in the proceedings, it follows that they must be affirmed, with costs.

[Albany General Term, December 5, 1864. *Peckham*, *Miller* and *Ingalls*, Justices.]

Edward Cluett, guardian of Mary E. Cluett and others, *appellant*, *vs.* Catharine Mattice, *respondent*.

No guardian of an infant *who is not a residuary or specific legatee*, is entitled to letters of administration with the will annexed, in preference to the widow of the testator.

THIS appeal is from an order of the surrogate of the county of Rensselaer, appointing the respondent, Catharine Mattice, administratrix, &c., with the will annexed, of Joseph C. Mattice, deceased. Joseph C. Mattice made his last will and testament on the 27th day of January, 1853, and therein

appointed his wife Dorcas sole executrix thereof, and guardian of his children. She died in October, 1857. The testator married the respondent in 1863, and died in July, 1864, leaving the said will unrevoked, and leaving him surviving the respondent, his widow, and four children, all of whom are minors. Mary E., one of said children, married the appellant who has been appointed the general guardian of all the said minors.

The property of the testator amounted to $19,000. Only $3000 of which is disposed of by the will, which has been proved as a will of real and personal estate. The respondent applied for letters of administration with the will annexed, and the appellant, as guardian, also applied for such letters. The surrogate appointed the respondent, and the said guardian appealed to this court from the order of the surrogate.

Nelson Davenport, for the appellant.

John Moran and *D. L. Seymour*, for the respondent.

By the Court, INGALLS, J. The material question to be decided upon this appeal is, whether the surrogate decided correctly, that the respondent was by law entitled to such letters of administration, in preference to the appellant, as such guardian. The revised statutes (*vol.* 2, *page* 71, § 3, *Edm. ed.*) expressly declare that all persons under the age of twenty-one years are incompetent to serve as executors. The same statute (*p.* 77, § 32,) provides that no letters of administration shall be granted to any person who is under the age of twenty-one years. Section 14 provides as follows: "If all the persons named in the will as executors shall renounce, or after summons issued and served as aforesaid shall neglect to qualify or shall be legally incompetent, then letters testamentary shall issue; and administration with the will annexed be granted, as if no executors were named in such will, to the residuary legatees, or some or one of them, if

there be any; if there be none that will accept, then to any principal or specific legatee, if there be any; if there be none that will accept, *then to the widow* and next of kin to the testator, or to any creditor of the testator, in the same manner and under the like regulations and restrictions as letters of administration in cases of intestacy." Although this case does not seem to come within the strict letter of this provision of the statute, yet I am inclined to think it is within its spirit and intention; otherwise it is unprovided for, which latter contingency I am not inclined to adopt, as it leads to speculations which are vague and unsatisfactory. I think the above construction justified. (*The People* v. *Utica Ins. Company*, 15 *John.* 380. *Smith's Com. on Con. of Statutes*, §§ 523, 695, 511, 701, 703. *Rice* v. *Mead*, 22 *How.* 449. *White* v. *Wager*, 32 *Barb.* 253.)

In this case, there was no executor living at the death of the testator; and the legatees named in the will are all minors, and as such incompetent to act either as executors or administrators in any case.

Section 33 of the same statute provides: "If any person *who would otherwise be entitled* to letters of administration, as next of kin, or to letters of administration with the will annexed, *as residuary or specific legatee*, shall be a minor, such letters shall be granted to his guardian, being in all other respects competent, in preference to *creditors or other persons.*" There are *no residuary or specific legatees* named in the will of Joseph C. Mattice, and all the legatees are minors and no creditor applied for such letters. The words "*other persons*" have received judicial construction. In *Wickwire* v. *Chapman*, (15 *Barb.* 304,) Johnson, J. after alluding to various provisions of the statute, including section 23, remarks, "The result of the various provisions is to give the guardian of infants a prior right, *over creditors of the estate and other persons having no right to share in the estate*, and not over any of the relatives mentioned in

section 27, whatever may be the sex or degree of kindred of the minor." Section 27 expressly names *the widow* as one of the relatives, and gives her a preference over all others. I think the case last cited establishes a principle which bears upon the case at bar. In that case the question was whether a grandchild, being a male and an infant, was entitled by his guardian to letters of administration in preference to a grandchild who was a female of the age of twenty-one years. And the court held that the adult was entitled to preference over the infant, who being a male, but for such infancy, would have been preferred. In this case the question is, whether the widow is entitled to preference over the infant children. I think the reasoning of the learned justice in the case last cited, which seems entirely satisfactory, in connection with a review of the various provisions of the statute bearing upon this question, lead to the conclusion that no guardian of an infant *who is not a residuary or specific legatee*, is entitled to letters of administration with the will annexed, in preference to the widow of the testator. The surrogate properly awarded the letters to the respondent, and the order must be affirmed, with costs to be paid out of the estate.

[Albany General Term, December 5, 1864. *Peckham*, *Miller* and *Ingalls*, Justices.]

MAPES, executor &c. *vs.* TYLER.

A testator, by his will executed in 1853, gave and bequeathed to his children therein named, all his property, real and personal, which should remain after payment of debts. He then provided that his executors should rent his farm for a period not exceeding ten years and until his youngest son should arrive at majority, and divide the proceeds in equal shares among the persons named. The will then contained the following provision: "After the expiration of the ten years when my youngest son, the said C. F. shall come of age, then the said property shall be sold and the proceeds equally divided amongst my heirs mentioned before in this my will." The youngest son having arrived at the age of twenty-one years; *Held* that the executor was not authorized to sell and convey the real estate, for the purpose of dividing the proceeds among the heirs.

THIS is an application to this court to obtain construction of the last will and testament of Amos Tyler, deceased, and direction as to its execution; which application is made pursuant to § 372 of the code. The will was executed on the 10th day of September, 1853, and the testator therein appointed Paul N. Tyler and Sylvester Mapes executors thereof. Since the execution of the will Paul N. Tyler has died, leaving the said Sylvester Mapes sole surviving executor, who makes this application to ascertain whether as such executor he is, by the will, empowered to sell and convey the real estate of which said Amos Tyler died seised. By the will *the testator gives and bequeaths to his children therein named, all his property real and personal which should remain after payment of debts.* He then provides that his executors shall rent his farm for a period not exceeding ten years and until his youngest son should arrive at majority, and divide the proceeds in equal shares among the persons named. The will contains the following provision: "After the expiration of the ten years when my youngest son, the said Chauncey Tyler, shall come of age, *then the said property shall be sold and the proceeds to be equally divided amongst my heirs mentioned before in this my will.* The youngest child has arrived at the age of

twenty-one years, and the executor desires to sell the said real estate and divide the proceeds, if he has power to do so under the will.

A. C. Niven, for the executor.

D. G. Starr, for the defendant.

By the Court, INGALLS, J. The will does not in terms *direct the executors* to sell the real estate, and the question presented is, whether they take that power by implication, which is the only question to be determined in this case. If the testator had merely directed a sale of the real estate and a distribution of the proceeds, although he omitted to designate the executors as the persons who should make such sale, yet, by implication, the authority to sell would have vested in the executors. (*Meakings* v. *Cromwell*, 5 *N. Y. Rep.* 136; *Willard on Real Estate, p.* 261; *Williams' Executors, p.* 579.)

The doubt, which arises in this case, as to the authority of the executors to make the said sale, is created *by the absolute devise of the real estate to the persons named in the will;* and it is certainly a grave question whether in such case the authority to sell by the executors, can be implied, where they are not expressly named as the donees of the power. When real estate is directed to be sold, and the proceeds divided, the fund, by equitable conversion, becomes money that the testator gives, and not land; and hence the executor is authorized to distribute the same, under the general authority which he possesses to pay debts and legacies. (*Willard on Real Estate, p.* 261; *Meakings* v. *Cromwell*, 5 *N. Y. Rep.* 139.) But where, as in this case, the land is expressly devised to persons named and competent to take under the will, no such equitable conversion occurs. I understand this distinction to be clearly recognized in *Meakings* v. *Cromwell*, above cited. In that case there was no devise

of the land, but merely a direction that after the death of the wife of the testator the land should be sold and the net proceeds equally divided between the persons named. And it was held that the executors took by implication a power to sell and divide the proceeds. Ruggles, J. says at page 138, "there was no devise of the land to these persons, or to any one else. As devisees they took the price of the land, and not the land itself." At page 141, "In *Patton* v. *Rundall*, (1 *Jacob & Walker*, 189,) the estate was devised to the children of the testator, and on that ground it was held that a power to the executors could not be exercised by implication."

In the case of *Patton* v. *Rundall*, the master of the rolls, at page 196, remarks: "It would not follow that it would by implication transfer the estate from the children in whom it was vested: that would be beyond any of the other cases. *Before an implication is raised there must be an absence of express devise, and in opposition to a devise it could never be raised.*"

I have been unable to find a case where the land was devised to others, in which it has been held that executors were, by implication, vested with power to sell for the purpose of distribution. The case of *Meakings* v. *Cromwell*, certainly does not question the soundness of the principle decided in *Patton* v. *Rundall*, but draws a very clear distinction between the two cases. In one there was a devise of the land to the children of the testator; in the other there was no such devise, but merely a direction to sell the land and divide the proceeds.

It is insisted that the first clause of the will does not amount to a devise of the land, but merely prescribes the share which each was to receive. I can not adopt that construction, as it does violence to the language used, and indulges an unwarrantable latitude of construction. It is an unquestionable rule in the construction of a will, that the intention of the testator, as gathered from the whole instru-

ment, is to control; but that rule is subject to the limitation, that in giving such construction, the law must not be violated, as it is far more tolerable that one estate suffer the embarrassment occasioned by a will so inartificially drawn as to fail to carry out even the obvious intention of the testator, than that a principle of law should be warped or directly violated to meet the necessity of a particular case. If the views expressed are correct, it follows that the executor is not authorized to sell and convey the real estate in question.

Judgment accordingly.

[Albany General Term, December 5, 1864. *Peckham*, *Miller* and *Ingalls* Justices.]

Burhans and others *vs.* Haswell, surviving Executor &c of Henry Burhans, deceased.

If a paper purporting to be a codicil to a will is not executed with the formalities required by law, the fact that the same has been presented to the surrogate, with the will, evidence received in regard to it, and the paper recorded by the surrogate in connection with the will, will not add, in any way to its force and validity as a codicil.

If such a paper be defective and informal in all the essential particulars which constitute a legal testamentary disposition of property, the surrogate has no authority to act upon such a case; and though he formally admits the paper to probate, as a codicil, this will not add to its legality. *Per* Miller, J.

Where heirs have called executors to an account and the account has been rendered upon the basis of a paper claimed to be a codicil to the will, and they have received money under its provisions and by color of the same as a valid instrument, whether they are not estopped from questioning its validity, or avoiding its effect as a part of the will of the testator? *Quære.*

Whether the children of one of the heirs, after having claimed and obtained from the executors the proceeds of a legacy given to such heir and his children, by the codicil, are in a situation to repudiate the alleged codicil, altogether? *Quære.*

In 1823 B., being the owner of three farms, called the homestead, the N. farm, and the W. farm, the latter being occupied by his son H. who was

unthrifty and addicted to intemperate habits, made and executed his will by which he devised the N. farm to his son D. for life, remainder to his children. In case D. should die leaving no issue, the remainder was devised to the executors in trust to sell the same, and as to one-third of the net proceeds, they were directed to "put out and keep out" the same at interest, said interest to be applied to the support of his son H. during his life, and upon his death and the arrival of his daughter T. to the age of eighteen years, the principal and any remaining interest was to be equally divided among the surviving children of H., share and share alike. The testator devised the W. farm, also, to his executors, in trust, with directions to sell the same, invest the proceeds and apply the interest to, or towards, the maintenance of his son H. and the education of his children; and when T. should reach the age of eighteen the proceeds were to be divided among the living children of H., share and share alike. The testator, in his lifetime, sold and conveyed the W. farm to one S., receiving back from S. a reconveyance of about nine acres, including the house where H. resided. In September, 1826, the testator gave directions to the attorney who had drawn the will, to have a codicil drawn, to provide for the case of selling the W. farm. A memorandum was accordingly drawn up by the attorney, in the absence of the will, but never executed by the testator, to the effect that instead of the "legacy and devise" to the children of H. the executors should pay the interest of the sum of $3000 towards the support of him and his family, and if that should be insufficient, that the executors appropriate so much of the principal as might be necessary; and that after the death of H. the executors pay and divide the said sum of $3000, or so much thereof as should remain, to and amongst such of the children of H. as might be living at the time of his decease; to be divided in the proportions therein specified.

The testator died in 1826, leaving three sons, J., D. and H. and one daughter, M. D. died in 1861 without issue, upon which the remainder in the N. farm, devised to his heirs, went to the executors in fee, subject to the trust. In 1863 the surviving executor of B. sold the N. farm, for the sum of $9,513.18, which, together with the sum of $800, the gross rent for two years, constituted the fund distributed by the surrogate by the decree appealed from.

Held that, assuming that the alleged codicil was to be considered a valid paper in the disposition of the testator's estate, the proper construction of it was that the testator did not intend, by it, to modify or change his original will any further than was required in consequence of the sale made by him of the W. farm; and that he designed merely to make a provision for his son H., and his children, in place of the devise of that farm which he had previously made for their benefit, without interfering with the remaining provisions of his will.

Held also, that such codicil not having been executed by the testator, nor formerly declared to be a codicil to his will, nor having any subscribing

witnesses, it was the proof before the surrogate connected with and explaining the circumstances under which it was drawn, and that only which made it obligatory in any sense.

That alone, and of itself, without such proof, the paper would have been unavailing for any purpose; and that so far as it was binding upon the children of H. it must be taken and considered in connection with the evidence introduced before the surrogate to support and sustain it.

That a strict construction should not be put upon the paper, in the same manner as if it was a codicil duly executed according to law; but it must be interpreted in the light of the evidence relating to, and the surrounding circumstances connected with, its origin and existence.

Held, further, that the children and grandchildren of H were entitled to one-third of the fund arising from the sale of the N. farm.

THIS is an appeal from the decree of the surrogate's court of the county of Albany, made November 10, 1863, by Hon. GEORGE WOLFORD, then being county judge of said county, and acting as surrogate in the particular case, the surrogate being disqualified by reason of relationship to the parties.

In April, 1823, Henry Burhans, then of the town of Bethlehem, made and executed his last will and testament, and on the 4th day of October, 1826, died, leaving him surviving three sons and one daughter, namely, John H. Burhans, David Burhans, Henry Burhans and Margaret, wife of John Haswell, all of whom are now dead, but all left children still surviving. At the date of the will in April, 1823, the testator was the owner of three several farms in Bethlehem, to wit, the homestead farm of one hundred and ninety-two acres, whereof one half was occupied by his son John H. Burhans, and the other half by John Haswell, the husband of Margaret, the farm known as the Nisketaw farm, and a third called the Wederwax farm. There was proof to show what it is claimed was apparent from the provisions of the will itself, that Henry Burhans, junior, (the son) was unthrifty and addicted to habits of intemperance. Upon the marriage of Henry in 1809, he was placed on a valuable farm, belonging to the testator, in Greene county, which he continued to occupy free of rent or other charge until 1818, when the

testator, it is said, owing to the improvidence and accumulated debts of his son, sold the farm, and from what remained of the avails, after paying up the aforesaid debts, he purchased the Wederwax farm, upon which Henry removed from Catskill, and where he was residing with his family at the date of the will. By the fourth item of the will, the testator devised the Nisketaw farm to his son David Burhans for life, the remainder to his children if any he should have. But in case David left no issue, said remainder was devised to the executors, or the survivors or survivor of them, in trust, to sell the same, and from the net proceeds pay one-third to "my son John H. Burhans, or his legal representatives;" one other third to "my daughter Margaret or her legal representatives." The remaining one-third said executors, the survivors or survivor of them, were directed to "put out and keep out" at interest, said interest to be applied to the support of his son Henry during life, and upon his death and the arrival of his daughter Temperance to the age of eighteen years, the principal and any remaining interest to be *equally* divided among the surviving children of Henry, *share and share alike.* David Burhans, to whom the life estate was devised, died in May, 1861, without issue; hence the remainder went to the executors in fee, subject to the trust created by the will. On the 18th of March, 1863, John Haswell, the sole surviving executor, sold the Nisketaw farm for the sum of $9539.18, which, together with the sum of $800, the gross rent of the same for two years, constituted the fund distributed by the decree from which this appeal has been taken.

By the fifth item of the will, the testator devised the Wederwax farm, also, to his executors in trust, with directions to sell the same, invest the proceeds and apply the interest to, or "towards" the maintenance of his son Henry and the education of his children, during his life and after his death; and when Temperance should arrive at the age of eighteen, said proceeds to be equally divided among the

living children of said Henry, share and share alike. The testator in his lifetime, and in March, 1826, sold and conveyed this farm (Wederwax) to James Schoonmaker, in consideration of $3274, and afterwards, and on the same day, received a deed back from Schoonmaker, reconveying to the testator about nine acres of the same farm, which included the dwelling house in which Henry resided. Henry continued to live on the nine acres until his death, in 1836, since which time the same has been occupied by his family, or some of them. About three weeks before the death of the testator, and in September, 1826, he called upon J. I. Ostrander, Esq., of Albany, who had drawn the original will, and stated to him that he wished to have a codicil drawn to be annexed to his will, to provide for the case of selling that farm, which he drew from the testator's words as the statement of what he wished effected by such codicil. The will was not with the testator at the time, and as correct references could not be made to it, the testator promised to hand it to him. It was afterwards left at his office in his absence, and was found there the Monday preceding the testator's death. The paper drawn by Ostrander was as follows:

"*Henry Burhanse's codicil to will.* 1st. That instead of legacy and devise to the children of his son Henry, that (the) executors pay the interest of the sum of $3000, annually, towards the support of him and his family, and if that should be insufficient, that the executors appropriate so much of the principal of the said $3000, as may be necessary for that purpose, and after the decease of his said son Henry, that the said executors pay and divide the said sum of $3000, or so much thereof as shall then remain in their hands, to and amongst such of the children of his said son as may then be living, at the time of his decease; to be divided amongst them, in the following proportions, that is to say:

To the sons of the said Henry two-thirds of the said sum remaining in the hands of the said executors; and to the daughters of the said Henry one-third of the said sum, to

be shared between the said sons and daughters equally in the proportions aforesaid, and that the said proportions be paid to them respectively, as they shall severally, after the death of (his my) said son, arrive at the age of 21 years, and if either of the children of (his my) said son should die before they arrive at the age of 21 years, the share or portion of those so dying shall be equally divided, if a son amongst the sons, and if a daughter amongst the daughters of (his my) said son Henry."

This alleged codicil, though never formally executed by the testator, it is insisted was accepted by all concerned as a part of his will, and with the will was presented for, and it is claimed admitted to, probate by the surrogate of Albany county, on the 13th of October, 1826, and as such has since remained of record. It has been recognized and accepted as a valid and effectual codicil by all persons interested in the estate of the testator, and especially by the children and representatives of Henry Burhans, junior, who have on two former occasions, once in 1829 and again in 1839, applied for and received large distributions made by decrees of the surrogate, founded upon said alleged codicil. After a hearing before the acting surrogate, on the 10th of November, 1863, he made a decree in which he decides that this paper is operative and binding as a codicil upon all parties affected thereby, and that all persons interested are estopped from questioning its validity, and as a consequence the bequest of one-third of the Nisketaw farm to Henry Burhans, junior, after the death of David, was revoked and did not pass under the will; and that neither Henry or his heirs take any interest in the Nisketaw farm except under the residuary clause, and therefore are only entitled to one-third of the proceeds of sale. From this decision the children and grandchildren appealed to the supreme court.

D. Wright, for the appellant.

C. B. Cochran, for the respondent.

By the Court, MILLER, J. It is too plain to require argument to demonstrate that the paper which was claimed to be a codicil to the last will and testament of Henry Burhans deceased, was not a legal and valid instrument, executed in proper form, so as to constitute it a portion of the testamentary disposition of the property of the testator. It is true that this paper was presented to the surrogate with the will; evidence was introduced in regard to it, and it was recorded by the surrogate in connection with the will of the decedent. All these formalities, however, which are not recognized in law as applicable to such a paper, will not make a valid codicil of that which the law pronounces to be informal and insufficient for such a purpose. The law expressly provides what shall constitute the execution of a will or codicil; and it is not claimed that the paper in question was executed in due legal form. Nor does the fact that the surrogate allowed proof to be taken in regard to it and recorded it, add in any way to its force and validity. I do not understand that it was formally admitted to probate as a codicil; and if it was, in my judgment it is so strikingly defective and informal in all the essential particulars which constitute a legal testamentary disposition of a testator, that even that fact would not add to its legality. It is sufficient that the surrogate had no authority to act upon such a case, and his action being entirely without jurisdiction, it must be considered as ineffective and void.

If the paper in question can not be considered as valid and legal and binding of itself, in consequence of the objections which are manifest to it as a codicil to a last will and testament, then another question arises, and that is, whether the persons interested in the estate of the deceased, especially those named in it, have not adopted and acted upon it as a valid instrument, so as to make it obligatory upon them. It is urged that the heirs of Henry Burhans, junior, having called the executors to an account, and that account having been rendered upon the basis of the alleged codicil, and they

having received money under its provisions and by color of the same as a valid instrument, they are estopped from questioning its validity, or avoiding its effect as a part of the will of the testator. I am inclined to the opinion that there may be some force in this suggestion, and I have some doubt whether the children of Henry Burhans, jr. having claimed and obtained the proceeds of the $3000 named in the alleged codicil, by virtue of it, are now in a position to repudiate it altogether. It is quite possible that to some extent, at least, they are barred by it, and the facts connected with it as presented by the proof before the surrogate prior to its being recorded.

Admitting that it is to be considered as a valid paper in the disposition of the testator's estate, the question then arises, what construction is to be placed upon it? Did the testator intend thereby to modify or change his original will any further than was required in consequence of the sale made by him of the Wederwax farm, and merely to make a provision for his son Henry and his children, in place of the devise of that farm which he had previously made for their benefit; or did he mean that this provision should be in lieu of all specific devises and bequests to them contained in the original will.

In interpreting the paper which is claimed to be a codicil we should not be confined to the paper itself, the same as if it had been actually executed. Alone, and of itself, without the proof connected with and explaining the circumstances under which it was drawn, it would have been unavailing for any purpose, and so far as it is binding upon the children of Henry, it must be taken and considered in connection with the evidence introduced before the surrogate to support and sustain it. It is only that evidence which makes it obligatory in any sense. It was not executed by the testator. It was not formally declared to be a codicil to his will. It had no subscribing witnesses. It must therefore stand or fall with the testimony which was given to establish it. And without this it amounts to nothing. According to the evidence of

Mr. Ostrander, who made the memorandum, the testator called upon him without having the will in his possession, and stated to him that he wished to have a codicil drawn to be annexed to the will, to provide for the case of selling the Wederwax farm. The witness took down the words employed by the testator at the time, and as correct references could not be made to the will, it not being there, the testator promised to bring it at some future time, which he did do, leaving it at the witness' office during his absence. In the light of these facts, it is very apparent that the testator merely intended to make a provision for his son Henry and his children in reference to the Wederwax farm, which he had sold and disposed of, by a pecuniary bequest, and nothing more, without interfering with the remaining portions of his will. If he had desired to cut off his son and his son's children, in regard to the other provisions of the will, he should, and I think he would, have so expressed himself at the time. There is no reason to suppose, from any of the surrounding circumstances of the case, that the testator intended to make any distinction between his heirs as to that portion of his estate which he had devised to his son David during his life, upon the decease of David, or that he desired to dispose of it differently from what was provided by the original will. In fact, there was no good reason existing at that time why he should do so. From any thing that appears, the same friendly feelings existed between the testator and his son Henry at the time he gave directions for a change in his will which had previously been maintained, and there is no proof that the son had done any thing to alienate the affections of his father, although it is urged that Henry's expenses had borne heavily upon the testator, and his habits of intemperance, which had long existed, had increased, yet if such was the fact there is nothing in the proof to show that the testator for a moment took these alleged faults into consideration. No word escaped his lips which denoted in any way that he contemplated a change in his will in conse-

quence of the son's improvidence. If such had been the case, he doubtless would have indicated it, when he gave directions as to the codicil. Then was the time to speak of it; and from the fact that he never said any thing upon that subject, at that time, or at any other time, the inference is irresistible and conclusive that he still clung to him with all the tenacity of an affectionate regard, which he had manifested by the bountiful provision which he had made for him and his children in the original will; and that he was still disposed to extend towards him that exact justice which he had meted out to all his children.

It was the sale of the Wederwax farm, and nothing else, which induced the testator to make the codicil so that his son would be provided for as he had first intended. And I think that the declaration and statement made by him at the time, must be considered, to a great extent, as controlling, and it evinces, beyond any question, that his intention was simply to provide a substitute or the equivalent for the farm devised to Henry and his children which had been sold by him, leaving his will otherwise in full force and effect.

In adopting this construction it may also be observed, that if the testator intended to cut off his son Henry from any further participation in his estate than what is provided for in the statement drawn by Mr. Ostrander, then he died intestate in reference to one third of the proceeds of the Nisketaw farm after the decease of his son David. The original will and the other facts of the case are in conflict with any such hypothesis or presumption.

The fact that in the provision which the testator made for the children of Henry, by the original will, the sons and daughters were made equal, and that by the alleged codicil the sons are to receive more than the daughters, does not in my judgment show that he intended to revoke all the provisions of the original will. It must not be forgotten that the statement made by the testator was but a memorandum

taken down by his attorney, without having the will before them at the time, and subject to revision upon its production. Like all such directions preliminary to the drawing and execution of the last will and testament or a codicil, it would be likely to be informal and imperfect, until put in the proper shape, which was intended to be done, but prevented by the unexpected decease of the testator.

It is also insisted that the words "legacy and devise to the children of my son Henry," as used, must be taken in a *collective* sense, and so as to embrace all the provisions of the will made in their behalf. As I have already expressed my opinion substantially, I do not think that a strict construction should be put upon the paper in question, in the same manner as if it was a codicil duly executed according to law; but it must be interpreted in the light of the evidence relating to, and the surrounding circumstances connected with, its origin and existence. They show pretty conclusively that the testator intended to provide merely for the change he had made by a disposal of the Wederwax farm, and therefore he could not have designed to include, by the terms employed, the devise of the Nisketaw farm as well as the Wederwax farm. Even if a strict construction was adopted, it may be observed that the expression used was not applicable, as no legacy or devise was made to either of the children. They only had a residuary interest in a fund which was provided for, and it is exceedingly doubtful whether the terms employed can be said to include all the provisions of the will.

The examination I have given to the case brings me to the conclusion that the surrogate erred, and the decree should be modified so that the children and grandchildren of Henry Burhans, jr. deceased, shall be entitled to one third of the fund accounted for. No costs of the appeal should be allowed to either party.

[Albany General Term, December, 5, 1864. *Peckham, Miller* and *Ingalls*, Justices.]

JOHN W. CONKLIN and others *vs.* ELI BARTON, Jun. impleaded with Hiland H. Barton.

A participation in the profits of a business, by a party, as a compensation for his labor or services, without his having an interest in the principal stock, or in the profits as such, or any right to control the business, does not make him a partner.

He must have an interest in the stock, with a right to control, and thus have a right to the profits as the result of the capital and industry in which all concerned are interested, and not as a measure of compensation merely; and must be liable for losses.

An objection for a defect of parties—such as the non-joinder of a person as plaintiff—which is not apparent upon the face of the complaint, can only be taken by answer.

If the objection is not thus taken the defendant will be held to have waived it.

Where an individual, though not actually a partner of, or connected in business with, another, by his acts and declarations holds himself out to a third person as a partner, and induces him to believe that he is such, and thereby goods are obtained on the credit of both, he will be estopped from denying the existence of a partnership, and will be liable as a partner.

What acts and declarations of an individual will amount to a holding of himself out to others as a partner.

After a witness has stated what he has seen and heard which tended to establish the existence of a copartnership, it is competent to prove by him, negatively, that he has no knowledge or information to the contrary.

Where individuals are sued as partners, for goods sold to them in their business as hotel keepers, and the partnership is denied, a bond, purporting to have been executed by both defendants for the purpose of obtaining a tavern keeper's license, is admissible in evidence as tending to establish a partnership.

APPEAL from a judgment entered upon the report of a referee.

The action was brought against the defendants to recover the balance of an account for liquors, alleged to have been sold and delivered by the plaintiffs to the defendants between the 29th of March and the second day of December, 1862. The defendant Eli Barton, jun. alone defended, claiming that he was not a partner of Hiland H. Barton, and that the liquors were sold to Hiland H. Barton alone. The cause was referred to Hugh W. McClellan, Esq. as sole referee.

Upon the trial it appeared, among other things, that Hiland

H. Barton kept the hotel at Eagle Bridge, and that the defendant Eli Barton, jun. kept a store in the immediate vicinity; and that the plaintiff's agent, Henry A. Backman, was acquainted with both parties, and went there to sell liquors in consequence of his having heard that the defendants were in partnership.

The questions raised upon the trial appear in the opinion of the court, and the facts, so far as material and which are not hereafter stated in the referee's findings, are therein adverted to.

The cause was submitted to the referee, who reported in favor of the plaintiffs. In deciding said action the referee found the following facts, that is to say:

First. That the plaintiffs are partners in business, and as such, between the 29th of March, 1862, and the 2d day of December, 1862, inclusive, they sold and delivered to the defendants, and at their request, wines and liquors to the value of four hundred and eighty-three dollars and eighty-one cents.

Second. That Hiland H. Barton, on the 4th day of November, 1862, paid the balance for all wines and liquors sold up to and including the 5th day of July, 1862, and that since that time the same defendant has paid upon the balance of said account the sum of fifty dollars.

Third. That the said Hiland H. Barton and Eli Barton, jun. were not at the time of the purchases of said liquors, partners, nor connected in business between themselves, but that they and each of them, and especially the defendant Eli Barton, jun. held themselves out to the plaintiffs as partners, and from this holding out, and by their acts and conversation, and from the facts and circumstances as appearing in evidence, they induced the plaintiffs to believe, and the plaintiffs did believe the said defendants to be partners and connected in the business for which said purchases were made, and thereby procured the credit for such purchases, and that the plaintiffs in making such sales relied upon the

belief that they were such partners, and so connected in business.

Fourth. That the balance unpaid of such purchases is the sum of two hundred and fifty dollars and forty-eight cents.

The appellants' counsel proposed to the referee upon the settlement of the case, to find the following facts:

"*Fifth.* That the defendant Eli Barton, jun. was not interested in said purchases, and never had or received any portion of said wines or liquors, or the avails or proceeds thereof.

Sixth. That Hiland H. Barton was sole proprietor of the Eagle Bridge hotel, and *made all the purchases* of the plaintiffs, and for his sole use and benefit."

Which the referee declined to do. To which ruling the counsel for the appellant separately excepted. And as a conclusion of law from the foregoing facts, the referee also found that the defendants in this action did owe the plaintiffs the sum of two hundred and fifty dollars and forty-eight cents, and that the plaintiffs were entitled to judgment for that sum, besides costs. Within the time prescribed by law, the counsel for the defendant Eli Barton, jun. made and filed exceptions to the report and decision of the referee, in due form. A judgment was duly entered in favor of the plaintiffs, upon the referee's report, and the defendant Eli Barton, jun. appealed to the general term of the supreme court.

R. A. Parmenter, for the appellants.

I. Shaver, for the respondents.

MILLER, J. The questions arising upon this appeal appear to be the following: 1. Whether Backman was a partner of the plaintiffs and a necessary party plaintiff in the action. 2. Whether there was sufficient evidence to support a judgment against Eli Barton, jun. 3. Whether the referee erred in allowing the following question to be put to the witness Back-

man: Did you ever see or hear any thing, about this hotel, or from the defendants, that they were not partners, in 1862, in the hotel business? 4. Whether the referee erred in admitting in evidence the bond for a tavern keeper's license. 5. Whether the referee erred in the settlement of the case, in rejecting certain findings proposed by the defendant.

1. Although Backman was interested in the profits of the concern he had, I think, no such interest as made him a partner. A participation in the profits of a business by a party as a compensation for his labor or services, without having an interest in the principal stock, or in the profits as such, or any right to control the business, does not make him a partner. Something more is essential. He must have an interest in the stock, with a right to control, and thus have a right to the profits as the result of the capital and industry in which all concerned are interested, and not as a measure of compensation merely; and must be liable for losses. (*Ogden* v. *Astor*, 4 *Sandf.* 311. *Burckle* v. *Eckhart*, 3 *Comst.* 132. *Collyer on Part.* §§ 25, 45, *and notes*, 3*d Am. ed. Story on Part.* § 30.)

There is also another answer to this objection which, in my judgment, effectually disposes of it. The objection being for a defect of parties—the non-joinder of Backman as a plaintiff—and not being apparent upon the face of the complaint, it could only be taken by answer. (*Code*, §§ 144, 147.) As it was not thus interposed, the defendant must be held to have waived the objection. (*Code*, § 148. *Zabriskie* v. *Smith*, 3 *Kern.* 336. *Scrantom* v. *The Farmers and Mechanics' Bank of Rochester*, 33 *Barb.* 527. *Abbe* v. *Clark*, 31 *id.* 238.)

2. The evidence upon the trial does not establish that Eli Barton, jun. was actually a partner of his brother, and the plaintiffs' right to recover in this action can not be sustained upon that ground. It is based, however, upon the fact that the defendant Eli Barton, jun. by his acts and conduct held himself out as a partner, inducing the plaintiffs to believe that

he was such partner, and thereby procured the credit for the sales made by the plaintiffs. Does the evidence establish that he did thus hold himself out to the plaintiffs, or their agent, or to the world as a partner of his brother, so that he is now estopped from availing himself of a different state of facts? If it does, then he is liable. The plaintiffs rely upon several circumstances to establish the important fact that Eli assented to the proposition that he and his brother were copartners in the hotel business.

The defendant Eli Barton, jun. lived at the hotel with his family, assisting his brother in and about the business, in a manner which might well convey an impression to ordinary observers, who had no knowledge of the facts, that he was one of the proprietors. His store was in the immediate vicinity, and there was no sign or other external indication to show who was the actual proprietor of the hotel. At one time, when called upon by the plaintiffs' agent, and according to his testimony, Eli was asked how are you getting along, or how are you doing, and he replied we are doing well; think we are making money; thus making no distinction between his own and his brother's business. On another occasion, when spoken to by the agent about some Bourbon whisky which had been ordered by Hiland, his brother, Ely remarked we are out of Bourbon, and I guess you had better send it up. Upon being being asked how he should mark it, Ely replied, mark it to Hiland, as he did not want the accounts mixed up, and to the effect that he did not wish the hotel and store accounts together. Eli does not positively contradict this testimony, but swears that he does not recollect some of the material portions of these conversations. Under the circumstances existing, the declarations alleged to have been made by Eli may well have created an impression on the mind of the plaintiffs' agent that he was one of the proprietors of the hotel, and have induced him to give the credit for the goods. He certainly spoke, if the witness is to be credited, as if there

was a business connection between him and his brother, and as if he had an interest in the hotel.

The evidence also shows that in July, 1862, a tavern bond was signed by Hiland in the joint name of both, and that the agent, in the latter part of the summer or the early part of the same fall, saw what purported to be a printed list of persons to whom licenses had been granted in the county of Rensselaer, on which were the names of the defendants connected together as keepers of the hotel. It appears that Hiland signed the bond without the knowledge of his brother at the time, for the purpose of including his brother's store in the same license, which was issued to both of them, and Hiland swears that he informed him of it, about the time it was done. There is some testimony to show that Eli ratified and approved it, although he had not authorized it to be done; but the evidence is somewhat conflicting as to Eli's immediate knowledge of the transaction. The plaintiffs' agent, although he had heard before the first credit was given that the defendants were partners, had no knowledge of this bond and license when the trade first commenced, and would not, therefore, originally have relied upon it in crediting the goods.

Although Hiland was in fact sole proprietor of the hotel and the goods were charged to him, (as the plaintiffs claim by the direction of both parties,) and there was no direct admission by either of them that they were copartners, yet it must be confessed there was much in the surrounding circumstances of the case and in the declarations made by Eli, to warrant a conviction that he was an actual partner. If Eli gave countenance to this impression, and his conduct and acts induced such a belief, then he would be liable. (2 *Greenl. Ev.* § 483.) He had no right to give encouragement to persons dealing with his brother, that he was a partner, without becoming liable. When called upon by the plaintiffs' agent, his plain duty was to speak and to state fairly and honestly how the facts were. Instead of employing the language he

did, if he desired to exonerate himself from responsibility, he should have said, with frankness, that he was not a partner, and have repudiated the idea that he had any connection with his brother's business. If he was aware of the fact, he should not have permitted his name to be used in the bond and in the license. He should have discountenanced it at once; and if these circumstances had any influence in procuring any portion of the credit they can not, I think, be entirely overlooked or disregarded. There was certainly some evidence before the referee, showing that Eli made declarations giving countenance to the theory that he was a partner of his brother; and I am inclined to the opinion that so far as the plaintiffs are concerned, he is now estopped from denying that fact. Whatever may be urged as to the weight of the testimony upon that point, there is no such preponderance, the other way, as would authorize this court to disregard the conclusion at which the referee has arrived upon that subject. I think there is sufficient evidence to sustain the judgment, and that the referee properly refused to nonsuit the plaintiffs.

3. I think that the question put to the witness Backman, in reference to what he had seen or heard about the hotel, or from the defendants, to the effect that they were not partners, was a proper one. The witness had previously stated what he had seen and heard, which tended to establish the copartnership; and it was, in my judgment, competent to prove negatively that he had no knowledge or information to the contrary. The object of the testimony introduced was to prove that the plaintiffs relied upon what they had heard, and what had been witnessed by their agent as to the acts of the defendants, and it materially strengthened that evidence, by showing that nothing different had transpired and come to their knowledge. It tended to show that they trusted to the information thus received, without being in the possession of any facts which conflicted in any way with what had already been proven. If they had heard from the

defendants or others that they were not partners, or if they had any knowlege of acts done by them or others to the contrary, it would at least have seriously weakened if not entirely destroyed the plaintiffs' case. The question is whether the plaintiffs gave the credit upon the facts introduced in evidence. In such a case, where the party claims to recover, I think it was competent to rebut any presumption to the contrary by proof that he had no other knowledge or information.

4. The bond was properly introduced in evidence. It was offered for the purpose of showing an act of the defendants which tended to establish that they were connected in business. On its face, it appeared to be signed by both of the defendants, and although it was proven that only one of them had executed it, and that he did so without the knowledge of the other at the time, yet it was claimed that the other had subsequently approved and ratified the act, thus assenting to the fact alleged, that he was at the time a partner. Even if the bond was executed some time after the account began to run and the plaintiffs had not originally relied upon it, yet if the fact was that it was the act of both parties, it aided in establishing that the defendants had been partners in the hotel business, anterior to its execution. At any rate, if the execution of the bond was sanctioned by both of the defendants, and the plaintiffs relied upon it from the time that it came to their knowledge, that fact was calculated to prove that the defendants were both liable for the articles delivered subsequent to that period.

5. The only remaining question is whether the referee erred in refusing to find as requested. The proposition to find that Eli Barton, jun. was not interested in the purchases and never had or received any portion of the liquors, or the avails of them, I think is substantially covered by the finding of the referee that the defendants were not, at the time of the purchases of the liquors, partners nor connected in business between themselves; but that they and each of them, especially Eli, held themselves out to the plaintiffs as

partners, and from this, by their acts and conversations, &c. induced the plaintiffs to believe them to be partners and thereby procured the credit. If this finding was justified, as would appear to be the case, then the defendants were not interested as partners in fact; but in law the sales made were to both defendants; Eli being interested in the purchases and the finding as proposed could not be, strictly speaking, accurate or consistent with the conclusion of the referee, which there was sufficient evidence to warrant.

In regard to the proposition to find that Hiland B. Barton was sole proprietor of the Eagle Bridge hotel, and made all the purchases of the plaintiffs for his sole use and benefit, it may be observed that it was mainly embraced in the findings already had. It was also objectionable because it embraced the proposition that Hiland had made all the purchases, when there was some evidence to show that on one occasion Eli had ordered goods, and I think that no error was committed by the referee in refusing to find as requested; and the result of these remarks is that the judgment entered upon the report of the referee should be affirmed.

INGALLS, J. concurred.

PECKHAM, J. dissented.

Judgment affirmed.

[ALBANY GENERAL TERM, December 5, 1864. *Peckham, Miller* and *Ingalls* Justices.]

43 444
64a 467

The Albany City Fire Insurance Company *vs.* Devendorf.

Where a creditor receives the check or draft of the principal debtor, payable at a future day, in payment of the debt, without objection, and instead of returning it to the maker, forwards it to the bank for collection, if the check or draft is not absolute payment of the debt, the effect of the transaction is to extend the time of payment after the demand has accrued, during which time the creditor would be precluded from bringing an action to recover the amount, of the principal debtor; and if the extension is given without the consent of a surety, it discharges him from liability.

THE plaintiff sued the defendant and one Thomas Stewart, to recover the sum of $188.46, and alleged in the complaint, in substance, that on the 18th day of Jauuary, 1862, said Thomas Stewart was appointed its agent at Amsterdam, "for the purpose of effecting insurance upon property at Amsterdam and in the vicinity thereof, and receiving the premiums for such insurance," &c.; and that to secure the return of such payments to the plaintiff (after deducting certain allowances to the agent,) the defendant entered into a bond with a penalty of $800, to the effect that Stewart should promptly account for and pay over and deliver all moneys &c. which might come into his hands as such agent. The complaint further alleged that there was due to the plaintiff, from Stewart, on account of such agency, the sum of $122.35, with interest from the 18th day of June, 1862, and $58.11, with interest from July 1, 1862. And the plaintiff claimed that Stewart not having paid the said amounts, the defendant was liable for the same. The defendant Stewart did not appear. The defendant Devendorf alleged in his answer, that he executed the bond simply as a surety for Stewart; that he never knew of any neglect or refusal of Stewart to pay the plaintiff any moneys due, except that in July, 1862, he was informed that there was due to the plaintiff, from Stewart, $58.11 for which the defendant was liable, all other sums and liabilities having, without the defendant's knowledge, been previously paid; and as to that sum he pleaded a tender to the plaintiff

before suit. The action was referred to a referee, who found, among other things, that during the month of May, 1862, Stewart, as such agent, issued policies in the plaintiff's company, on which the aggregate amount of premiums over and above commissions, was $121.42, which was received by said Stewart. He also found that during the month of June the other indebtedness, of $58.11 was incurred by Stewart, which amount, before the commencement of this suit, was tendered to the plaintiff, and was paid to the referee. Also, that on the 2d day of June Stewart sent his account current for his previous month's business for the plaintiff, amounting to $121.42, with his check dated on that day, on a bank in Amsterdam, payable fifteen days after date, which check the plaintiff received, and deposited the same for collection; and that such check was not honored. The referee also found that Stewart was accustomed to remit monthly for monthly balances, by checks on the Bank of Amsterdam of ten, fifteen or twenty days. That the custom of the plaintiff was to require monthly accounts from agents, and that monthly balances should be remitted; the remittances varying from the 1st to the 25th of the month. The referee reported in favor of the plaintiff, for both amounts; upon which a judgment was entered, and the defendant Devendorf appealed.

I. Shaver, for the appellant.

W. L. Learned, for the respondent.

By the Court, MILLER, J. The check or draft of Stewart on the Farmers' Bank of Amsterdam appears to have been received in payment of his indebtedness to the plaintiff. After it was received it was retained and thus accepted and forwarded to the bank for collection, as it would seem in conformity with a practice previously existing in the dealings of Stewart with the plaintiff. No objection was made to it when first received, and it was not returned by the plaintiff

to Stewart. Even if the draft or check was not an absolute payment, yet the effect of it was to extend the time of payment after the demand had accrued some fifteen days, during which time the plaintiff would be precluded from bringing an action to recover the amount, of the principal debtor.

Upon well settled rules this was an extension of the time of payment as to the amount for which the draft was given; and the case is clearly within the principle decided and settled in *Bangs, receiver*, v. *Mosher*, (23 *Barb.* 478.) It was there held that where a creditor takes the draft or check of the principal debtor payable at a future day, in payment of the debt, this is a valid extension of credit, and if done without the consent of the sureties, discharges them from liability. That action was brought by the plaintiff as receiver of an insurance company upon a bond similar in its condition to the one upon which this action was commenced, and in most of its leading characteristics is identical with the case under consideration. I think it is decisive of the point now considered. (*See also Dorlon* v. *Christie*, 39 *Barb.* 610, *and authorities there cited.*)

Several objections are presented to the views I have expressed, which are entitled to consideration.

It is said that the bond being conditioned that Stewart should account for and pay over all moneys &c. and perform all duties &c. Stewart was not liable to an action until a refusal, on demand, to pay over the money. I think this objection is not available, and that no demand was necessary before suit brought. It is the duty of a mere collecting agent who receives money on account of his principal to pay it over, within a reasonable time, and if it be not so paid, the principal may maintain an action for it, without any previous demand. (*Lillie* v. *Hoyt*, 5 *Hill*, 395.) Cowen, J. who delivered the opinion of the court in the case cited, after reviewing the authorities upon the question presented, remarks: "The utmost that our own cases establish is, that a foreign factor and an attorney at law are not liable till re-

quest, though on our latest decision I should hardly think this predicable of an attorney." Although Stewart was authorized to enter into contracts as well as to collect money, yet I think he was not, within the rule laid down, either a factor or an attorney, and therefore it was not necessary to make a demand before suit brought. He was bound to remit when the moneys were received, and the existence of any custom allowing time would not extend or enlarge the time differently from what the law made it. It would not vary the legal effect of his contract; certainly not to the injury of the rights of the surety and the impairing of his obligation.

There is no force in the position that this case is not analogous to that of a surety of a debt. The case of *Bangs* v. *Mosher*, (23 *Barb.* 478,) holds expressly to the contrary, and there the principal stood in a fiduciary relation to the obligee, and the obligation of the surety was for the faithful performance of the duty of his principal.

I think it sufficiently appears that the check was intended to apply upon the plaintiff's account, and the fact that it was not returned to Stewart but sent for collection is sufficient evidence of its acceptance.

The objection that even if accepted the check would not extend the time of payment, is covered by the remarks already made.

It is also insisted that there is no plea setting up the check as an extension of the time of payment to Stewart and a release of Devendorf, and therefore the check should not have been received in evidence. I am inclined to think that the answer of payment was sufficient to authorize the admission of the evidence. The answer alleges that all sums and liabilities except a small amount, in reference to which the defendant had interposed a separate defense, had been liquidated, paid and settled by and between the plaintiff and Stewart; and I think evidence of the transaction was proper under this allegation. It tended to prove payment or a set-

tlement of the plaintiff's demand, and was within the answer. Even if the answer was insufficient upon this point, I still think the case should be considered as if the facts found by the referee were especially averred in it. (*Hart* v. *Hudson*, 6 *Duer*, 294; *Payne* v. *Woodhull*, *Id.* 169; *Clark* v. *Dales*, 20 *Barb.* 66, 67.) And upon an appeal the court may treat the pleadings as having been amended in any respect in which the court ought clearly to allow an amendment at special term. (*Wright* v. *Whiting*, 40 *Barb.* 242, *and authorities there cited.*)

As it is manifest that the referee erred in allowing a portion of the plaintiff's claim, the judgment entered upon his report must be reversed and a new trial granted, with costs to abide the event.

INGALLS, J. concurred.

PECKHAM, J. expressed no opinion.

New trial granted.

[ALBANY GENERAL TERM, December 5, 1864. *Peckham*, *Miller* and *Ingalls*, Justices.]

THOMAS NEWMAN *vs.* JOHN P. CORDELL and wife.

43 448
58 636
67 382
5L 187
14h 278
36h 71
88a 422

On the 6th of July, 1859, J. P. C., being indebted to the plaintiff, at the time, on a note part due, executed and delivered to E. C., his sister-in-law, a deed of certain premises then owned by him. On the 20th of September, 1859, E. C. executed and delivered to one H. a deed of the same premises. On the same day, H. executed and delivered to A. C., the wife of J. P. C., a deed conveying to her certain lands in W., of which he was the owner. The only consideration for this last conveyance was the property deeded to H. by E. C., the two pieces being considered of about equal value. In March, 1861, the plaintiff recovered a judgment against J. P. C. upon the note, and an execution issued thereon was returned unsatisfied.

Held, that in the absence of any explanation whatever to show the reason why, or how and in what manner, H. became connected with the affair, and

why he executed a deed to A. C. for a piece of real estate without receiving any consideration from her, and only received, in exchange, a deed from E. C. of another piece of property, which formerly belonged to A. C.'s husband; and with no evidence to prove that A. C. ever paid a particle of consideration for the property conveyed to her by H., or that she had any means of her own; it was extremely suspicious upon the face of the transaction, that these conveyances should have been made, under such circumstances, and that A. C. should have thus acquired a title to, and she and her husband be in the possession of, real estate of the same value as that formerly owned by the latter.

And that J. P. C. and his wife, in an action brought against them by the plaintiff to have the deeds declared void as being in fraud of J. P. C.'s creditors, were called upon to explain the suspicious circumstances; and in the absence of a satisfactory explanation, a strong conviction was fastened upon the mind, difficult to be removed, that the whole affair was not *bona fide* and honest, but a mere cover to place J. P. C.'s property in the hands of his wife, so as to prevent its being reached by his creditors.

Held, also, that although the plaintiff was bound to establish a want of consideration, for the conveyances, he might do so by circumstances, as well as by positive evidence.

Held, further, that there was at least a fair question for the jury to determine, as to the intent of J. P. C.; and that if there was enough testimony to be presented to them, then their finding upon that question should not be disturbed.

And that although J. P. C. swore that there was no intention to defraud the plaintiff, or to prevent the recovery of any claim the plaintiff might have against him, his statement was not to be regarded as entirely conclusive or satisfactory.

That if there was no consideration in fact for the conveyances to E. C. and A. C. respectively, nor any evidence to that effect, then, as a matter of course, those grantees each had knowledge of the intention of J. P. C., and a fraudulent intent on their part must be presumed. And in that contingency neither of them was a *bona fide* purchaser, and was not in a position to rely upon a want of knowledge of the intention of J. P. C.

The absence of evidence which it is in the power of the party to produce is often as effective, in disposing of a case, as testimony of a positive character. *Per* MILLER, J.

Where conveyances are attacked for fraud, and there are many facts surrounding the case which cast suspicion upon the transaction, the defendants should be prepared to meet the allegations of unfairness; and if they fail to do so, the plaintiff will be entitled to the benefit of all the unfavorable inferences which may legitimately be drawn from their neglect, and the general features of the case.

The denial of a party charged with fraud, that there was any intention to defraud the plaintiff, can scarcely be regarded as any thing more than an

expression of the opinion of the party charged with the fraud, as to the character of the transaction, and his own estimate of it.

While the party alleging fraud is bound to prove his allegation, by sufficient evidence, it is not essential that it should be established by direct proof. Resort may be had to circumstantial and presumptive evidence.

The rule is well settled, that to make a conveyance fraudulent as to the grantor, fraud or fraudulent intent must be shown on the part of the grantee, as well as on the part of the grantor.

THIS was an action, brought on the equity side of the court, for the purpose of having certain deeds, alleged to have been executed for the purpose of defrauding creditors, declared void, and to have certain lands held in the name of Angeline Cordell, wife of the defendant John P. Cordell, adjudged to be in fact the property of John P. Cordell, and liable to be sold for the payment of his debts. The cause was tried before Justice HOGEBOOM and a jury ordered to try the issues of fact made by the pleadings, at the Albany circuit, in January, 1863. It appeared upon the trial that the plaintiff held a note against John P. Cordell, dated May 27, 1857, payable in one year after date, for $300 and interest. In October, 1860, a suit was brought upon this note, and the plaintiff recovered a judgment against the defendant, which was docketed in the Albany county clerk's office, March 23, 1861, for $422.94, damages and costs. The judgment could not be collected upon execution which had been issued and was returned unsatisfied. That the defendant, John P. Cordell, on the 6th of July, 1859, executed and delivered to his sister-in-law (his brother's wife) a deed of certain premises in Albany, then belonging to the grantor. That on the 20th of September, 1859, this sister-in-law of the defendant, Elizabeth Cordell by name, executed and delivered to one Joseph Hilton a deed bearing date on that day, and conveying to Hilton the same premises which John P. Cordell had conveyed to Elizabeth. On the same day, Joseph Hilton executed and delivered to Angeline Cordell, the wife of John P., a deed bearing date on the above day, and conveying to her lands in Watervliet, in Albany county, of which he was

then the owner. It was alleged that the conveyance from John P. to Elizabeth Cordell was made without consideration, and was executed for the purpose of defrauding creditors, &c. and especially to defraud the plaintiff. The only consideration for the execution of the deed by Elizabeth Cordell to Joseph Hilton was the execution of the deed by Hilton to Angeline Cordell, the wife of John P.; and the only consideration Hilton had for the execution of such deed to Mrs. Cordell was the deed from Elizabeth Cordell to him. The plaintiff called John P. Cordell as a witness, upon the trial, and, among other facts, proved that the property he conveyed to his sister-in-law was worth $1300 over and above the incumbrances; and that the real estate conveyed by Hilton to the defendant's wife was worth about the same amount. That at the time the execution was issued he had no property liable to execution. He also swore that at the time he conveyed the premises to Elizabeth Cordell she paid him money; that he received from her, at different times, $600; that he had forgotten how much he received at the time of the transfer; that at that time his brother, David R. was living, and that Elizabeth gave him no notes or mortgage, on the transfer; and that it was so long ago he could not recollect the exact amount he received from her. That a man by the name of Leet and a young girl were present when the deed was delivered, and that Leet was dead, and the girl living in Bethlehem. That he owed David's wife; could not tell the amount, or how long it had been due. It had been standing from six months to a year. It had accrued within four but not all within three years. Had owed her for six months to a year; perhaps longer. Could not say how much. The defendant further swore that Elizabeth had notes against him at the time of the transfer, but he could not tell whether any of them were signed by other persons; nor could he tell the amount of his indebtedness to her; the amount of notes she held was some $500. He further swore that there was money paid him for the property, besides that paid on the

delivery of the deed, but none was paid after it; and the money paid before the delivery was all paid at once. David (his brother) paid him $600 at one time, a day or two before the delivery, and the balance, something like $100, on the day of delivery. The agreement in reference to the transfer was that he was owing her upon notes; the notes were to be allowed as a part of the consideration; some $600 and over was to be paid in cash; and she was to take the property subject to the mortgages. He further swore that a man by the name of James Jordan was present when the $600 was paid, and that he was then in court; that no receipt was taken when that money was paid; that he continued to live on the premises conveyed to his sister-in-law, until the exchange with Hilton, when he moved to Watervliet. The defendant further swore that Elizabeth Cordell had never been in possession of the property conveyed to her by him, any more than to receive the deed therefor. Upon his cross-examination by the defendant's counsel, the witness testified that the consideration for the deed to Elizabeth, as near as he could get at it, was about $700 in cash, $500 that he owed her and she to take the place subject to the mortgages already on it, $860; that he negotiated with his brother David R. as agent for his wife, Elizabeth; that he did not make the transfer with intent to defraud his creditors.

The defendant moved for a nonsuit, upon several grounds mentioned in the opinion. The motion was denied, and the defendant's counsel excepted. The defendant's counsel then requested the court to charge the jury upon several points, which requests were refused. The questions of fact were submitted to the jury, who found a verdict in favor of the plaintiff, upon all the issues in the case; and judgment being entered thereon, the defendant appealed to the general term.

Mr. Havens, for the appellants.

R. W. Peckham, Jr. for the respondent.

By the Court, MILLER, J. The most important questions in this case arise upon the motion made by the counsel for the defendants, at the close of the evidence, to nonsuit the plaintiff.

First. The first point to be considered in this connection is whether there was sufficient evidence of fraud and of a fraudulent intent on the part of John P. Cordell, in the whole transaction, to authorize the court to submit the case to the jury and which would justify the jury, in connection with other evidence, in rendering a verdict in favor of the plaintiff.

(1.) I think it may be said with propriety that the transaction presented by the evidence in this case has some strange characteristics. The defendant John P. Cordell conveys his real estate in Albany to Elizabeth Cordell, the wife of his brother. About two months after this conveyance, Elizabeth conveys the same premises to one Joseph Hilton a third party. On the very same day Joseph Hilton conveys another piece of real estate situated in Watervliet to Angeline Cordell the wife of John P. Cordell, and one of the defendants in this suit. The only consideration of this last transfer which appears to have been made in connection with the conveyance to Hilton, was the property deeded to Hilton by Elizabeth Cordell. The defendant John P. Cordell was, at the time, apparently in embarrassed circumstances, and was indebted to the plaintiff for the amount of a note for which a judgment was subsequently obtained, to enforce the collection of which this action was brought. The two pieces of real estate thus transferred appear to have been considered of about equal value, and the one was regarded as an equivalent for the other, in the transaction between the parties. With no explanation whatever to show the reason why, or how and in what manner, Joseph Hilton became connected with this business, and why he should have executed a deed to the wife of John P. Cordell, of a piece of real estate for which he received no consideration from her, and only received a deed of another piece of property from Elizabeth Cordell,

upon the same day, which formerly belonged to the husband of Angeline Cordell; with no evidence to prove that the wife ever paid a particle of consideration for the property conveyed to her by Hilton, or that she had any means of her own to do so; it is certainly remarkable that she should find herself invested with the title of property equivalent in value to that which had been conveyed away by her husband only a short time previously. It is suspicious, extremely suspicious upon its face, that these conveyances should have been made under such circumstances, and that the wife should thus have acquired a title and she and her husband be in possession of real estate of the same value as that owned by the husband before the conveyance executed to Elizabeth Cordell. I think the defendants were called upon to explain these singular facts of the transaction, and in the absence of the evidence of Elizabeth Cordell, the wife, who was a competent witness, (31 *Barb.* 506; 37 *id.* 44,) or any other person, to show how it happened that these transactions should have occurred, a strong conviction is fastened upon the mind, difficult to be removed, that the whole affair was not *bona fide* and honest, but a mere cover to place the defendant John P. Cordell's property in the hands of his wife, so as to prevent its being reached by his creditors.

(2.) I think, so far as the evidence relates to the payment of a consideration for the conveyances made to Elizabeth and to Angeline Cordell, it is by no means satisfactory. It is true that the plaintiff must establish a failure of consideration; but he may do so as well by circumstances as by positive evidence. It is said that John P. Cordell's testimony shows a valid and full consideration for the conveyance executed by him to Elizabeth Cordell, and if there was no fraud in this the action must fail. There are, I think, some circumstances which may be considered as detracting from his credibility, and impairing the force and strength of his evidence. In the first part of his direct examination, he swears that he received $600, at different times. He has forgotten how

much, but he thinks over $100 on the day of the conveyance. He can not recollect the exact amount he got of her. In contradiction of this he subsequently testifies that his brother David paid him $600 at one time *a day or two* before the deed was delivered, and the balance, something like $100, upon the delivery of the deed.

He also swears that one Jordan was present when the $600 was paid, and a little girl when the deed was delivered. It may be observed, in reference to this testimony, that it was not very specific as to date, time, or amounts. It gave no details as to these payments, if made as first stated at different times, and it was somewhat inconsistent and contradictory. The facts occurring upon such an occasion would naturally make an impression which would not very soon be effaced from the memory, and it is somewhat singular that the evidence should not have been clearer, and more accurate and specific.

It will also be noticed, that he calls no one to corroborate him upon the material points in controversy to which his testimony related. Jordan, who saw the money paid, he states, was present in court and the girl, Elizabeth Cordell, and his own wife were within his reach, and could doubtless have been obtained if desired; the plaintiff endeavored to procure the attendance of Elizabeth, but was unable to find her. As to the deed to Angeline Cordell, although she swears in her answer that she paid a valuable consideration out of her separate property, for the farm in Watervliet, yet there was no evidence, whatever, to show that any consideration was paid by her, or that she had any property of her own. Why was she not produced and sworn as a witness? If it was true, as set forth in her answer, she could have stated every thing that she knew in regard to it, and might have been able to make a perfect explanation of the whole transaction. The absence of evidence which it is clearly in the power of the party to produce, is often as effective in disposing of a case as testimony of a positive character. The

conveyances in question were attacked for fraud, and certainly there were many facts surrounding the case which cast suspicion upon the transaction. The defendants should have been prepared to meet these allegations of unfairness, and as they failed to do so the plaintiff was entitled to the benefit of all the unfavorable inferences which might legitimately be drawn from their neglect and the general features attending the case.

(3.) Although the defendant John P. Cordell swears that there was no intention to defraud the plaintiff, or to prevent a recovery of any claim which the plaintiff might have against him, I do not consider that his statement is to be regarded as entirely conclusive or satisfactory.

As was justly remarked by Sutherland, J. in *Babcock* v. *Eckler*, (24 *N. Y. Rep.* 623,) "Intent or intention, is an emotion of the mind, and can usually be shown only by acts and declarations; and as acts speak louder than words, if a party does an act which defrauds another, his declaring that he did not by the act intend to defraud is weighed down by the evidence of his own act." Such testimony can scarcely be regarded as any thing more than an expression of an opinion of the party charged with the fraud, as to the character of the transaction and his own estimate of it. While the party alleging fraud is bound to prove his allegation by sufficient evidence, (*Hildreth* v. *Sands*, 2 *John. Ch.* 43, and 14 *John.* 498,) it is not expected that it should be established by direct proof, and resort may be had to circumstantial and presumptive evidence. (*Waterbury* v. *Sturtevant*, 18 *Wend.* 353. *Jackson* v. *King*, 4 *Cowen*, 220.) The intent to defraud may be inferrible from circumstances. (24 *N. Y. Rep.* 623.) Sometimes a combination of circumstances will characterize a transaction, so plainly and so clearly as to stamp upon it unerring and indelible marks of fraud, which can not be mistaken, and the transaction itself will present phases so remarkable and peculiar, that no fair minded person will hesitate to pronounce it as fraudulent. These *indicia*

are often the clearest proof in the world, and quite as reliable as positive evidence. As there were circumstances connected with the conveyance of John P. Cordell's property to Elizabeth Cordell, and the subsequent transfer of other property back to his wife, which threw doubt and distrust on the fairness and integrity of the transaction, and which were not explained by any other testimony, it does not follow, by any means, that implicit confidence was to be placed in the whole of his statements. It follows from the remarks already made that there was at least a fair question for the jury to determine the intent of John P. Cordell, from his own evidence and from the facts and circumstances connected with the case. And if there was enough testimony to present to them, then their finding should not be disturbed upon that question.

Second. The next question which properly presents itself for consideration relates to the fraudulent intent of Elizabeth Cordell and Angeline Cordell in taking a conveyance of the real estate deeded to them respectively. The rule is well settled, that to make a conveyance fraudulent as to the grantor, fraud or fraudulent intent must be shown on the part of the grantee, as well as the grantor. (18 *Wend.* 365. 2 *John. Ch.* 35. 18 *John.* 515.) If, however, there was no consideration in fact nor any evidence to that effect, then as a matter of course Elizabeth and Angeline Cordell each had knowledge of the intention of John P. Cordell, and a fraudulent intent on their part must be presumed. In that contingency neither of them was a *bona fide* purchaser, and was not in a position to claim a want of knowledge of the intention of the defendant John P. Cordell. The proof in the case bore upon this as well as the questions already discussed, and it can scarcely be insisted that there was no proof because positive evidence was not introduced. Circumstantial evidence is often as potent as direct testimony; for circumstances can not lie, while human testimony is often uncertain and unreliable. Some of the remarks made in discussing the other points, as to the general characteristics

of the transaction, have a bearing upon the point now under discussion, and it is therefore unnecessary to enlarge upon it. Angeline Cordell was a defendant, and the question of intent as to her and Elizabeth was a proper subject for determination upon a consideration of the whole case.

Third. The point urged on the motion for a nonsuit, that there was no allegation in the complaint of any bad faith or fraudulent intent on the part of Angeline Cordell, I think can not be sustained. The complaint alleged that she gave no consideration for the premises in Watervliet, conveyed to her, and that the whole consideration came from her husband. The whole statement presented a case showing that a fraud had been perpetrated by her husband John P. Cordell, in conveying away his real estate with an intent to defraud his creditors, and that she was a party to that fraud, for his benefit. If the complaint was informal, it could have been amended at the trial, and it is not too late, even now, to grant such an amendment as would make it conform to the proof. I think, however, it is sufficient, and the objection is not a valid one.

Fourth. The remaining exceptions relate to the charge of the judge, and his refusals to charge. He is supposed to have erred in refusing to charge as requested, and in charging in several particulars which I shall have occasion to examine.

(1.) He declined to charge that in the absence of any express evidence to establish a fraudulent intent in John P. Cordell, the plaintiff was bound by his evidence which showed that the conveyance was made in good faith and for a valuable consideration, but submitted the same for the jury to determine. I see no objection to such refusal, or to this portion of the charge. The question whether the conveyance was made in good faith and for a valuable consideration was for the jury; and if the judge had charged as requested he would have disposed of the case without submitting it to them. Even if the defendant is correct in

claiming that there was no express evidence to establish such fraudulent intent, the proposition embraced too much; and as it was clearly wrong in part, there was no error committed by the judge in refusing to charge as requested. A request to charge the jury should be made in such form that the court may charge in the very terms of the request, without qualification. (11 *N. Y. Rep.* 61.) The judge is not required to separate a proposition of this kind and pick out what is good and refuse the rest. (*Keller* v. *N. Y. Central R. R. Co.*, 24 *How. Pr. R.* 172.) I also think the judge did no injustice to the defendants in leaving the whole question embraced in the defendant's proposition to the jury. It was for them to say whether there was any express evidence, and whether the evidence established any fraudulent intent. Also whether the testimony of John P. Cordell proved a valid and good consideration for the conveyance, and good faith in its execution; and the court was not authorized to assume that it did.

(2.) The next exception also is not well founded. I do not think that the judge was authorized to charge that the evidence showed that the transfer from John P. Cordell to Elizabeth was made for a good consideration. The evidence was to be considered in connection with the circumstances attending the case. To claim thus much, it would be necessary to assume that the testimony of John P. Cordell was entirely consistent with all the other facts appearing upon the trial. If there were any inconsistencies it was the duty of the jury to reconcile them if they could, and if they could not, to give credit to such portion of his testimony as was justified by the circumstances. It was peculiarly within their province to determine whether his evidence established a valid consideration, and this was properly submitted to them by the judge.

(3.) Nor do I think that the succeeding exception can be upheld. There certainly were some circumstances which tended to show that Elizabeth Cordell was not a *bona fide*

purchaser for a valuable consideration, and that she had knowledge of the fraudulent intent; and it was therefore appropriate and right for the court to refuse to charge that there was no evidence upon that point, and to charge that there was no positive evidence on that subject; but the circumstances were for their consideration.

(4.) I am also of the opinion that the judge committed no error in refusing to instruct the jury that if John P. Cordell had a fraudulent intent in conveying away his property, any intention of fraud on the part of Elizabeth Cordell, his vendee, was so much the less presumable. Why should it be less presumable because John P. had a fraudulent intent? I think the judge fairly left it for the jury to determine the matter, as a question of fact.

(5.) The remaining exception to the refusal to charge, and the charge made, is equally untenable. I think the judge would not have been justified in saying to the jury that there was nothing in the case showing that Angeline Cordell had any knowledge of, or was a party to, the fraudulent intent of John P. Cordell. She was his wife, and by some means had received a conveyance of real estate in exchange for that owned by her husband, and conveyed by him to Elizabeth Cordell. The circumstances connected with the transactions were somewhat unusual, and, in the absence of any explanation, at least liable to suspicion. While then the judge stated there was no direct evidence upon that point, he left the whole matter to the jury as a question of fact. There was no legal error in this, and it was quite as favorable a disposition of the point presented as the defendants had a right to require.

In conclusion, I am satisfied that no error was committed by the judge in disposing of the various questions raised upon the trial, and I am not prepared to say that there is any good reason for setting aside the verdict of the jury. A charge of fraud in a case like this, must depend very much upon the incidents surrounding it. Fraud is rarely perpetrated

openly and in broad day light. It is committed in secret and privately, and usually hedged in and surrounded by all the guards which can be invoked to prevent discovery and exposure. Its operations are frequently circuitous and difficult of detection. The proof of it is very seldom positive and direct, but is dependent upon very many little circumstances and conclusions to be drawn from the general aspects of the case. Even an absence of evidence which is supposed to be within the reach of the party charged with the fraudulent act, may sometimes induce unfavorable inferences, and exercise an important influence upon the final determination of the question. While the plaintiff must make out a case by legal proof, he has also a right to call to his aid any failure of the defendant to explain, when in his power to do so, what would seem to be tainted with doubt and distrust. And these considerations appear to have been entertained in the case at bar, and as there was no unfairness, and nothing transpired upon the trial which would authorize this court to disturb the judgment, it must be affirmed.

Judgment affirmed with costs.

[Albany General Term, December 5, 1864. *Peckham, Miller* and *Ingalls*, Justices.]

Higgins *vs.* Wright.

It is a general principle of equity that a surety, or a party who stands in the relation of a surety, is entitled to be subrogated to all the rights and remedies of the creditor against the principal whose debt he has been compelled to pay.

And where a person standing in the situation of a surety for the payment of a debt receives a collateral security for such payment, for his indemnity, the principal creditor is in equity entitled to the benefit of such collateral security; although he did not originally rely upon the credit of such collateral security, or know of its existence, in the first instance.

Higgins *v.* Wright.

An accommodation maker of a promissory note, for whose benefit, in part, the note was given, can not claim an equitable right to a security which has been pledged to the person occupying the position of second indorser, for his special indemnity, after such second indorser has been absolutely discharged from liability.

In order to avail himself of the benefit of such security, it is essential that the maker of the note should have paid the debt for which he was liable.

If he fails to pay the debt, and the second indorser has been discharged from liability, the security pledged to the latter by the first indorser, for his indemnity, will revert back to and become the property of the first indorser, and a subsequent assignment thereof by the second indorser, to the maker, will convey no title.

A referee, being appointed by the court to perform certain duties, is one of its officers, and moneys in his hands being in the custody of the court, no action can be brought against him to recover those moneys, without the permission of the court.

Either leave must be obtained, for that purpose, or an application should be made by motion, for directions as to the disposition of the fund.

THIS action was brought to recover from the defendant the sum of $210.50, with interest from the 1st of April, 1858. The plaintiff proved the following facts: In November, 1857, the plaintiff made his promissory note payable three months after date, to the order of one Costigan, for $200. This note was in part for $75, legal services rendered to the plaintiff by Costigan, and in part for the accommodation of Costigan. Costigan indorsed, and afterwards John I. Burton became the *second* indorser on the note, for the accommodation of Costigan. Six months afterwards, on the 1st of April, 1858, the defendant (as referee in a partition suit) became possessed of the sum of $210.50, awarded by the decree of sale, in said suit, to Costigan, for his costs as attorney for one of the parties therein. On the 26th of April, 1858, an order was served upon the said Costigan for his examination as a judgment debtor in supplementary proceedings against him. *Two hours before this order was served*, and on the same day, he made an assignment of these costs to Burton, without any consideration paid, and solely to indemnify said Burton against *his liability as second indorser* upon the note of $200, *due three months before*. This

assignment was, on its face, absolute. On the 1st of May, 1858, the examination of Costigan on the supplementary proceedings commenced. Burton was also examined on the 5th of May, and again on the 7th of May. Intermediate the two days, and on the 6th of May, the attorney for the plaintiffs in the supplementary proceedings procured from the Albany City Bank, the holder of the note, an assignment thereof, and of a judgment they had recovered thereon against the parties, and procured a valid release of Burton from all liability by reason of his indorsement, and delivered such release to him on the same day. On the next day, the 7th of May, and the last of the examination in the supplementary proceedings, Jacob I. Werner, Esq. was duly appointed receiver of all the property of Costigan. Both Costigan and the plaintiff were then insolvent. Werner qualified as receiver of Costigan on the 10th of May, 1858; and A. B. Voorhees, Esq. was appointed receiver of the plaintiff on the 11th of May, 1858, upon proceedings against him. The defendant paid over these costs to the attorney of Werner, the receiver of Costigan, soon after the 17th of May, 1858. Afterwards the judgment upon the note was paid by Voorhees, the plaintiff's receiver, out of the plaintiff's property. On the 17th of May, 1858, Burton gave notice of the assignment to him. On the 31st of July, 1860, Voorhees was discharged as receiver of Higgins, and on the 8th of August, 1860, Burton, at the request of Costigan, assigned his claim on said money to the plaintiff, and immediately thereafter this action was brought. The cause was tried at the Albany circuit in December, 1862, before Justice PECKHAM without a jury, who found that the action did not lie, and directed the complaint to be dismissed. The points raised appear in the opinion. Judgment was entered in favor of the defendant, and the plaintiff appealed.

A. Bingham, for the appellant.

S. Hand, for the respondent.

By the Court, MILLER, J. The principal question in this case is, what was the effect of the release executed and delivered to Burton on the 6th of May, 1858? Did the assignment of the costs to Burton then enure for the benefit of Higgins, or did they become vested in Costigan and pass over to Werner, who was on the next day appointed receiver in the supplementary proceedings which had been previously instituted against Costigan upon the judgment in favor of Cuyler & Henry? The assignment of the costs by Costigan to Burton was made to indemnify Burton as second indorser of the two hundred dollar note made by Higgins; and the release to Burton by the owner of the judgment discharged him absolutely and unqualifiedly from all liability arising upon the note; and it could not be collected of Burton subsequent to that time. He therefore, from the time of the release, ceased to have any interest in the moneys, or any control over them. How did the plaintiff stand in relation to the parties? He was the accommodation maker for the benefit of Costigan, although it appears that to the extent of seventy-five dollars the note was given for services rendered him by Costigan, and for which he was indebted to Costigan. Under these circumstances the question arises, whether the plaintiff was entitled to be subrogated in the place of Burton.

It is a general principle of equity that a surety, or a party who stands in the relation of a surety, is entitled to be subrogated to all the rights and remedies of the creditor against the principal whose debt he was compelled to pay. (*Matthews* v. *Aikin*, 1 *Comst.* 599. *Fell's Law of Guar. and Sur. note* 19, *p.* 296.) And where a person standing in the situation of a surety for the payment of a debt receives a collateral security for such payment for his indemnity, the principal creditor is in equity entitled to the benefit of such collateral security; although he did not originally rely upon the credit of such collateral security, or know of its existence in the first instance. (*Curtis* v. *Tyler*, 9 *Paige*, 435. *Bank of*

Auburn v. *Throop*, 18 *John.* 505. *Moses* v. *Murgatroyd*, 1 *John. Ch.* 119. *Phillips* v. *Thompson*, 2 *id.* 418. *Vail* v. *Foster*, 4 *Comst.* 312.)

As the plaintiff was actually indebted for a portion of the note to Costigan, he could not have any claim against Costigan to the amount of that indebtedness, as he would only pay his own debt to that extent, by paying the note. It is very questionable, under the authorities cited, whether the plaintiff occupied such a position as to entitle him to the benefit of the rules laid down in reference to the remainder of the note. He was not the principal creditor, as the note belonged to another party; and so far from being the surety of Burton he was his principal. As between himself and Burton, he was bound to pay the whole note, and was in fact and in law primarily liable. It is difficult to see how the principle of subrogation is applicable to such a case, and by what legal rule an accommodation maker of a promissory note, for whose benefit part of the note was given, can claim an equitable right to a security which had been pledged to the person who occupied the position of second indorser, for his special indemnity, after such second indorser has been absolutely discharged from liability. But even if the principle of subrogation could be invoked under such circumstances, the plaintiff was not in a position to claim that right. In order to avail himself of the benefit of this security, it was essential that he should have paid the debt for which he was liable. (*Willard's Eq. Jur.* 110. *Mathews* v. *Aikin*, 1 *Comst.* 595. *Elwood* v. *Deifendorf*, 5 *Barb.* 398. *Hayes* v. *Ward*, 4 *John. Ch.* 123.)

This had not been done, and therefore, if otherwise entitled to claim an assignment of the costs in question and to be clothed with the rights of an assignee of such claim, the plaintiff was barred from so doing, and the failure to pay was an insurmountable barrier to the assertion of any such right. The right of subrogation could only accrue upon

payment by the plaintiff of the full amount of the debt, which, at the time when Burton was released, had not been done.

Such being the case, and Burton having been unconditionally released from all liability upon the note, the costs which had been pledged to him and in which he only had a special property for the purpose of indemnifying him as indorser, reverted back to, and became the property of, Costigan. (*Brownell* v. *Hawkins*, 4 *Barb.* 491.) From that moment the title was in Costigan, subject, however, to the rights acquired by virtue of the proceedings supplementary to execution which had been instituted and were pending, and subject to any order which might be made in these proceedings. A receiver having been appointed, by operation of law, the title to the costs became vested in the receiver by force of this appointment. (*Porter* v. *Williams*, 5 *Seld.* 142. *West* v. *Fraser*, 5 *Sand.* 653. *Steele* v. *Sturges*, 5 *Abb.* 442. *Levy* v. *Cavanagh*, 2 *Bosw.* 100. *Wilson* v. *Allen*, 6 *Barb.* 542. *Fessenden* v. *Woods*, 3 *Bosw.* 554.)

The costs then, on the 7th day of May, 1858, belonged to, and became vested in Werner, as receiver of Costigan, and the subsequent assignment of them by Burton conveyed no title to the plaintiff. Whatever interest Burton ever had, became divested by the release to him as second indorser of the note, and he never afterwards became invested with any interest which he was authorized to assign to any one.

Werner being receiver of Costigan was duly authorized to receive and collect the costs of the defendant, and a payment by the defendant to Werner or to his attorney exonerated the defendant from liability. If Werner made an improper appropriation of the money, the law would furnish a remedy to compel him to account to the proper person.

The remarks already made leave the money in the hands of an officer of the court where it legitimately belonged, and this would seem to dispose of the case without any further discussion. As, however, it is insisted that the amount of the judgment against the plaintiff and Costigan was fully

paid by the receiver of the plaintiff, and therefore to hold that the plaintiff was not entitled to those costs would in effect compel him to pay the note twice, it may be well enough to examine this proposition.

It seems to be based upon the erroneous idea that the costs were paid over to the assignee of the judgment (who was also the attorney for Werner, the receiver,) as such assignee, and appropriated by him on the judgment; thus making a double payment of it, or a holding by him without an appropriation of them. Now I do not understand that this is the fact. The judge has found that the money was paid over to him as the attorney of Werner the receiver of Costigan. It is not claimed that it belonged to the attorney; nor does the evidence show that he appropriated it to the payment of the judgment, or to his own use. It was merely in his hands, to be paid over to the receiver to be applied by him in payment of the judgment of Cuyler & Henry against Costigan, or to such other purposes as might be lawful. The receiver is accountable for the money, and would be responsible to whoever was entitled to it. If he did not apply the money upon the judgment under which the proceedings were instituted, as he was bound to do, he would be liable to the party authorized to call him to an account. If the attorney failed to pay the receiver, a right of action accrued to the receiver, to compel him to pay over what did not belong to him. It is quite probable that the money was applied upon the judgment of Cuyler & Henry, although the evidence does not distinctly show that fact. It is not important in this case to determine what disposition was made of it, and it is quite enough that it was lawfully paid to the attorney of the receiver, who was vested with power to collect these costs. It is very clear, to my mind, that the plaintiff, in any view which may be taken of the subject, had no equities of any kind in the money in question, at the time of the release to Burton, or any subsequently acquired right to the same. If he had any claim,

his remedy was against the receiver, and not against the defendant, whose responsibility ceased when he paid over the money to the attorney of the receiver; and he cannot therefore sustain this action.

The money being voluntarily paid by the referee to the receiver, of course no action was necessary by him to test the question as to whom the money belonged to. In fact it does not distinctly appear that the plaintiff claimed it of the referee, or that any contesting claims were presented to him.

I am also inclined to think that there is another insuperable obstacle to a recovery in this action. The defendant being a referee appointed by the court to perform certain duties, was one of its officers, and the moneys in his hands being in the custody of the court, no action could therefore be brought against him without the permission of the court. Either leave must be obtained or an application should be made by motion for directions as to the disposition of the funds. This doctrine has been repeatedly held as to receivers, and by analogy there is no good reason why it should not apply to referees, who would seem to stand upon the same footing. (*Willard's Eq. Jur.* 335, 336. *De Groot* v. *Jay*, 30 *Barb.* 483. *Musgrove* v. *Nash*, 3 *Edw.* 172. *Parker* v. *Browning*, 8 *Paige*, 388. *Noe* v. *Gibson*, 7 *id.* 513. *Vincent* v. *Parker*, *Id.* 65. *Taylor* v. *Baldwin*, 14 *Abb.* 166.)

It follows, for the reasons given, that the judgment of the circuit court must be affirmed with costs.

Albany General Term, December 5, 1864. *Peckham*, *Miller* and *Ingalls* Justices.]

Elizabeth Brinckerhoff *vs.* Philip Phelps.

If one undertakes to sell land knowing that he has no authority to convey, the question of good faith can not arise, and he can not claim, and is not entitled to, any protection upon that ground.

If, under such circumstances, he assumes to sell without being in a situation to convey, and without the power to confer any title, he does it at his peril, and can not claim the protection of a vendor in good faith.

He violates his contract, and must be held responsible for the damage occasioned by a breach of it.

Where a vendor knows that he has no power to convey, and fails to disclose to the vendee his want of power, the case is clearly distinguishable from one where a party acts under an honest but mistaken belief that he has a good title, and does every thing in his power to execute the contract.

Where a contract to convey land describes the grantor as "trustee, &c." but without stating for whom, this will not relieve him from personal responsibility, nor change the legal effect of his contract.

In an action for the breach of a contract to convey lands, the true rule of damages is, the value of the lands at the time of the breach, and interest from that time.

The decision in *Brinckerhoff* v. *Phelps*, (24 *Barb.* 100,) reaffirmed, and held to be decisive and controlling.

THE question in this case arises upon a verdict for the plaintiff subject to the opinion of the court at a general term, directed by Mr. Justice Hogeboom, at the Albany circuit, in November, 1863. The cause was first tried before Justice Harris, who held that the plaintiff was not entitled to the value of the land above the contract price, but only to reimbursement of the amount paid. The judgment was reversed on appeal. (*See* 24 *Barb.* 100.)

The action was brought to recover damages for an alleged breach by the defendant of a contract, to convey to the plaintiff certain lands in the county of Fulton. The complaint alleged that on the 13th of June, 1849, the defendant made an agreement in writing by which he agreed to convey the plaintiff lot No. 82, in Glen, Bleecker & Lansing's patent, for seven shillings per acre. The lot was to be surveyed at the expense of the estate for which the defendant acted as trustee, and the plaintiff was to pay for the actual number

of acres, as appeared by such survey, and a warranty deed was to be given by the 15th of July, 1849, and the lot conveyed, free of incumbrance. It was also alleged that $318.25 of the purchase money was paid at the execution of the contract, and that the lot contained eight hundred and thirty-five acres; and also that the plaintiff offered to pay the balance of the purchase money, and demanded a conveyance according to the contract, but that the defendant refused to convey, and a judgment was demanded that the defendant convey according to the contract, or that the plaintiff recover damages. The answer alleged that the defendant never was the owner of the land in question, and never had any interest in it, except as trustee of Catharine W. Van Rensselaer, under a deed of trust, which gave the defendant no authority to sell the land in question without the written consent of Mrs. Van Rensselaer. That at the time of the contract the plaintiff, and her agent who negotiated it, knew the nature of the defendant's interest and his power under the deed of trust. That the defendant has been always willing to convey, but Mrs. Van Rensselaer has absolutely refused her consent to such conveyance. These allegations were denied in the reply.

On the trial, the contract was proved, and the payment thereon, at its date, of $318.25 of the purchase money; also that the lot contained eight hundred and thirty-five acres, according to a survey made prior to August, 1849, and that thereupon the plaintiff tendered the balance of the purchase money and demanded a deed, and that the defendant refused to give it, for the reason that Mrs. Van Rensselaer had positively refused her consent, and at that time the property was worth $2000. It was also proved, that by an order of the court of chancery, made November 17, 1841, the defendant was appointed successor of Julius Rhodes as trustee for Mrs. Van Rensselaer, under a deed of trust dated May 20, 1841, which embraced the lands in question, by virtue of which, with the assent in writing of Mrs. Van Rensselaer, the de-

fendant as trustee was authorized to sell; and that soon after his appointment as trustee, Mrs. Van Rensselaer told the defendant he need not consult her about the sale of any of such trust land, but to consult her husband, and whatever they agreed upon she would give her consent thereto. That prior to the making the agreement with the plaintiff, the defendant sold several pieces of land, without first consulting Mrs. Van Rensselaer, and she gave her assent. That the agreement with the plaintiff was made with the concurrence of the husband, the defendant believing that Mrs. Van Rensselaer would give her consent to it, which the defendant repeatedly requested her to do, but she refused to consent to any deed to the plaintiff upon any terms and conditions whatever, for personal reasons. None of these facts were disclosed to the plaintiff. That the defendant, finding it impossible to pursuade Mrs. Van Rensselaer to consent to any deed to the plaintiff, afterwards sold the land to another person, for $1000, Mrs. Van Rensselaer assenting to the conveyance. Upon these facts, the justice directed a verdict for the plaintiff for the sum of $3378.42, subject to the opinion of the court, this sum being the value of the land, with the money paid, and interest, deducting the amount of unpaid purchase money.

C. B. Cochran, for the defendant.

J. K. Porter, for the plaintiff.

By the Court, MILLER, J. Upon the former trial of this cause it was decided at the circuit that the plaintiff was not entitled to recover any thing beyond the amount paid by her to the defendant, at the time of the execution of the agreement, with the interest. This was held to be erroneous, by the general term, upon appeal, and the rule of damages was decided to be the value of the land at the time of the breach, and interest from that time. The learned judge who wrote

the opinion placed his decision upon the ground that the defendant either made a contract, which he knew he had no right to make, or he arbitrarily refused to fulfill when he found he could get more than the price for the land which the plaintiff had agreed to pay. (24 *Barb.* 105.) It is obvious that unless the facts of the case were materially changed upon the second trial, or unless the principle laid down by the court in the opinion referred to has been overruled by some subsequent adjudication, the question now presented must be regarded as *res adjudicata.*

First. It is insisted by the defendant in regard to the first proposition that the facts of the case are entirely different from those presented on the former trial; that there was then no evidence of the good faith of the defendant, and the judgment of the general term was based upon the ground that want of faith might be imputed to him; whereas now the case establishes that the defendant acted in good faith and made every effort to have the contract performed.

The additional facts proven upon the second trial, while they tend to establish that the defendant believed that Mrs. Van Rensselaer would assent to the execution of the deed to the plaintiff, do not negative the conceded fact that he knew that he was prohibited from selling without her consent; or that he was not ignorant of his want of power in this respect. Nor does the defendant satisfactorily explain why he did not disclose to the plaintiff the parol agreement between himself and Mrs. Van Rensselaer, dispensing with her consent, which was expressly required by the terms of the trust deed; nor why he retained the money paid by the plaintiff upon her contract; and why he united with Mrs. Van Rensselaer in selling the same property at an advanced rate to a third party, without any consultation with the plaintiff; without notifying her, and in fact without any offer on his part to convey such title as he had to the premises in question. It is by no means clear, I think, from the evidence that the defendant proved that he acted in good faith,

or that he was in a position to claim that such was the fact. But suppose he had established good faith on his part; does that improve his condition, if he had knowledge that he had no right to convey? It was not the want of good faith upon which the decision was made by the general term, but upon the fact that he had knowledge or arbitrarily refused to convey. Either the one or the other made him liable. If he sold the land knowing that he had no authority to convey, then the question of good faith can not arise, and he can not claim and is not entitled to any protection upon that ground. If under such circumstances he assumes to sell without being in a situation to convey, and without the power to confer any title, he does it at his peril, and can not claim the protection of a vendor in good faith. He violates his contract, and must be held responsible for the damage sustained by a breach of it. (*Hopkins* v. *Gazebrook*, 13 *Eng. Com. Law*, 100, 101. *Hopkins* v. *Lee*, 9 *Wheat.* 109. *Robinson* v. *Harman*, 1 *Exch. R.* 849. *Hill* v. *Hobart*, 16 *Maine Rep.* 169. *Trull* v. *Granger*, 4 *Seld.* 115. *Fletcher* v. *Button*, 6 *Barb.* 650.) It is evident that the defendant knew that he had no power to convey, and there is no evidence to show that he disclosed to the plaintiff his want of power. The case is clearly distinguishable from one where a party acts under the honest but mistaken belief that he had a good title, and does every thing in his power to execute the contract.

Second. I think that the principle established in 24 *Barb.* 100, has not been overruled by the case of *Conger* v. *Weaver*, (20 *N. Y. Rep.* 140,) and that the recovery in the case at bar can be upheld within that decision. That was an action brought to recover damages for the breach of an executory contract for the sale of a farm. The defendant tendered a warranty deed executed by himself and wife, which the plaintiff refused to accept, alleging that it did not convey a good title free from all incumbrances. The fact was, that the defendant had a good title to all but five and three fourth acres

of the whole farm, and as to this, the evidence was conflicting whether the conveyance was made to the defendant or to his father, the deed having been destroyed by fire. It was apparent that the defendant had acted in good faith, and the court of appeals held that only nominal damages were recoverable for the the failure of the vendor to perform an executory contract for the conveyance of land, made in good faith and broken without fraud, by reason of his inability to make a good title. Denio, J. who delivered the opinion of the court, in referring to the case at bar remarks, that the judgment, as he understands it, was placed upon the distinction established in 2 *Wend.* and 4 *Denio*, of a contract made with *knowledge on the part of the vendor that he had no title, or of a dishonest refusal to convey because a better price could be obtained from another purchaser.* It will be seen that there is no analogy between the case cited and the present one. There was no pretense that the defendant in *Conger* v. *Weaver* had knowledge of the defect in his title; and the evidence shows that he did all in his power to carry out the contract. I understand the learned judge to assent to the correctness of the distinction recognized by Judge Gould in his opinion; and in no way to question the authority of that case.

In *Baldwin* v. *Munn*, (2 *Wend.* 399,) one of the cases cited by Judge Denio, the refusal to convey was placed upon the ground that after the making of the contract the defendant had ascertained that his grantor had conveyed to another party before he deeded the land to him.

In *Peters* v. *McKeon*, (4 *Denio*, 546,) the other case cited, the defendant could not make a perfect title to an undivided twenty-fourth part owned by an infant, as to which he offered a covenant by a third party, that the infant would convey on coming of age. The defendant tendered a deed and offered such title as he had, which the plaintiff refused to receive. Neither of these cases sustains the defendant's po-

sition. They were disposed of upon facts entirely different from those presented in the case at bar.

I see no difficulty in reconciling the cases cited with *Brinckerhoof* v. *Phelps*, (24 *Barb.* 100,) and discover no adjudication which disturbs the doctrine there laid down. It therefore must be considered as decisive and controlling in this case. Although the contract describes the defendant as a trustee, yet it does not state for whom, and I think does not relieve him from personal responsibility, nor change the legal effect of his contract. (*Taft* v. *Brewster*, 9 *John.* 334. *White* v. *Skinner*, 13 *John.* 307. *De Witt* v. *Walton*, 5 *Seld.* 570. *Brinckerhoof* v. *Phelps*, 24 *Barb.* 100.)

It is conceded that there was a mistake in allowing interest on $318.25 paid to the defendant on the 13th of June, 1849, in addition to the excess of the value of the property beyond the amount remaining unpaid; and this amount, being $202.02, should be deducted from the amount of the verdict.

Upon the plaintiff stipulating to deduct the above mentioned amount, judgment should be entered on the verdict in favor of the plaintiff, with costs.

[Albany General Term, December 5, 1864. *Peckham, Miller* and *Ingalls*, Justices.]

Betsy Merry, Administratrix of George Merry, *vs.* Gouverneur M. Sweet and others.

A discharge granted by a county judge under the provisions of the revised statutes in relation to "voluntary assignments made by an insolvent and his creditors," (2 *R. S.* 15,) *held* void, where the petitioner's affidavit annexed to his petition instead of stating that the petitioner had not disposed of or made over any part of his estate for the future benefit of himself or his family, as required by section 7, stated that he had not disposed of or made over any part of his estate for the future benefit of himself *and* family.

Merry *v.* Sweet.

The total omission of a fact, necessary to be proved to confer jurisdiction upon an officer, will make all his proceedings void.

It *seems* the county judge has no authority to grant a discharge where a portion of the creditors omit to state the nature of their demands; or where the schedule of the insolvent omits to state the true cause and consideration of his indebtedness to certain of his creditors. *Per* MORGAN, J.

MOTION for a new trial, by the plaintiff, upon exceptions ordered to be heard in the first instance at general term.

This action was brought to recover possession of a canal boat, called the "O. H. Smith," seized by the sheriff of Onondaga county upon an execution in favor of the defendant Sweet against Sylvester Jones. One of the questions litigated upon the trial related to the validity of the mortgage (given by Jones to George Merry) as against creditors. Another question involved the validity of an insolvent discharge, granted to Jones by the special judge of Onondaga county under the two-third act. Both of these questions were decided against the plaintiff by the judge upon the trial, who directed a verdict for the defendants. The general term denied the motion for a new trial, upon both grounds; but we confine the report of the case to the questions arising upon the insolvent discharge. The facts are sufficiently stated in the opinion of the court.

D. Pratt, for the plaintiff.

Chas. Andrews, for the defendant.

MORGAN, J. If the insolvent discharge of the judgment debtor, (Sylvester Jones,) is valid, it will be unnecessary to discuss the other questions raised by the plaintiff's exceptions This discharge which appears to be regular on its face, was objected to for want of jurisdiction in the special judge of Oswego county to grant it; and the defendant read in evidence the original petition and schedule upon which the discharge was granted for the purpose of showing a want of jurisdiction

appearing upon the face of the papers. The discharge was under article 3, title 1, chapter 5, part 2d of the revised statutes, in relation to "Voluntary assignments made pursuant to the application of an insolvent and his creditors." (2 *R. S.* 15.) By section 4 of that article, the petitioning creditors are required to make an affidavit, setting forth among other things the nature of their demands, and whether arising on any written security or otherwise, with the general ground and consideration of such indebtedness." The affidavit of George G. Breed only specifies the indebtedness to him to be "on account of judgment entered against said insolvent, justly due to him from said insolvent." The affidavit of William Wait only specifies that the indebtedness to him is "on account of a judgment entered against said insolvent upon a promissory note." These two items amount to $340.12.

The same fault is detected in the schedule of the insolvent. By § 5, subd. 4, this schedule is required to state the time, cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued. The following are the statements in certain cases, and all of them, viz. "E. Merry, Phœnix, $41.63, account accrued at Phœnix. G. Merry, Phœnix, $79.66, judgment on note and account, accrued at Phœnix. Abram Groff, Syracuse, $120.00. E. Horkaway, Salina, $35.00."

By section seven, the petitioner is required to annex his own affidavit to his petition, account and inventory, in which he must depose, among other things, that he had not at any time or in any manner whatever, disposed of or made over any part of his estate for the future benefit of himself *or* his family; whereas the affidavit made by Jones before the special county judge only stated that the petitioner had not made over any part of his estate for the future benefit of himself *and* family.

Without looking further, it is evident that neither the petitioner himself or the petitioning creditors, have conformed to the requirement of the statute. Neither Breed nor Wait,

two of the petitioning creditors, state the general ground or consideration of the judgments. Nor do they add the declaration required by article 7, § 11, (2 *R. S.* 36.) The allegation of Wait that his judgment was entered against the insolvent upon a promissory note, furnishes no information of the consideration of the indebtedness. The statement of the insolvent that he owed an account, or that the demand of G. Merry against him was "a judgment on note and account," furnishes no information of the true cause or consideration of the indebtedness. And there is no pretense that the debt of the insolvent to Abram Groff or E. Horkaway is set forth with any attempt to conform to the requirement of the statute.

Could the special county judge receive the petition and act upon it, as a sufficient compliance with the statute? I think not. As it failed to conform to the requirements of the statute in an essential particular, that officer did not acquire jurisdiction of the proceedings. To confer jurisdiction upon the officer, the schedule of the creditor should contain the particulars required by § 5. (*Stanton* v. *Ellis*, 12 *N. Y. Rep.* 578. *And see Gillies* v. *Crawford*, 2 *Hilton*, 338.) The case of *The People* v. *Stryker*, (24 *Barb.* 649.) seems somewhat adverse to this view; but the point in question was not necessarily before the court in that case. But the defect in the insolvent's affidavit annexed to his petition is perhaps of a more serious character. The change in the phraseology from the language of the statute is not to be deemed immaterial. The affidavit might as well be omitted altogether, if the most material portion of it can be disregarded by the officer to whom it is presented. It is no evidence that the insolvent has not made a provision for himself, because he swears that it is not for himself *and* family. Nor is it evidence that he has not made it for his family alone. If we allow a departure from the plain language of the statute in such a case, there is no omission which may not be palliated or excused in order to clothe the officer with jurisdiction. It is a gen-

eral rule applicable to special proceedings before inferior courts and officers, that where certain facts are to be proved as a ground of jurisdiction, a total defect of evidence as to one fact is sufficient to take away jurisdiction. (*Daniels* v. *Patterson*, 3 *N. Y. Rep.* 47. *People* v. *Bancker*, 5 *id.* 106. *Morewood* v. *Hollister*, 6 *id.* 309.)

As the plaintiff interposed this insolvent discharge as an obstacle in the collection of Sweet's judgment, the defendants have a right to object that it is void for want of jurisdiction in the officer to grant it; and upon an examination of the record, the invalidity of the discharge sufficiently appears to sustain the objection. In my opinion the discharge is void for want of jurisdiction in the special county judge to grant it.

Bacon and Foster, JJ. concurred, upon the ground that the petitioner's affidavit annexed to his petition, did not conform to the statute. Upon the other points they expressed no opinion.

New trial denied.

[Onondaga General Term, January 3, 1865. *Morgan*, *Bacon*, and *Foster*, Justices.]

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John W. Lawrence and Walter Bowne, Executors, &c. *vs.* The St. Mark's Fire Insurance Company.

The plaintiffs, being the owners of certain premises, leased the same to C. who, by the terms of his lease, agreed to pay the necessary premium to enable the lessors to keep the premises insured for their own benefit, to the amount of $5000. At the execution of this lease there was a policy on the property. When it expired, C. asked leave to change the company. He agreed verbally to keep the property insured, for the lessors, to the extent of $5000. He thereupon took out the policy in suit, insuring "his" (C.'s) building; "loss, if any, payable to L.," one of the lessors, who was acting trustee for the property.

Lawrence *v.* St. Mark's Fire Insurance Company.

Held 1. That the agreement of C. to keep the property insured for the lessors, to the extent of $5000, made him liable to the lessors for a breach of that agreement, and gave him an insurable interest in the property to that extent.

2. That if he had an insurable interest, the property was his for the purpose of indemnity, to the amount of his interest; and he could insure that interest.

3. That the plaintiffs were entitled, under all the facts in the case, to recover on the policy as insuring them.

THE plaintiffs owned No. 31 Beekman street, New York. On May 11, 1853, they leased the same for ten years to James Conner, who made extensive improvements on the building. By his lease, Conner agreed to pay the plaintiffs the necessary premium to maintain an insurance for them of $5000. It was subsequently arranged between the plaintiffs and Conner, on his application, that he should keep an insurance of $5000 on the premises for the plaintiffs. With this view, he took out the policy in suit, insuring "James Conner against loss or damage by fire, to the amount of $5000, on his six story brick building, with tin roof and coping, situate No. 31 Beekman street, in the city of New York. * * * Other insurance permitted without notice until required; loss, if any, payable to John W. Lawrence," who was the acting trustee of the plaintiffs. The policy was kept renewed to September 4, 1862, at an expense in all of $737.50, paid the defendants for premiums; the last four renewals stating the insurance to be "on building 31 Beekman street." The plaintiffs, relying upon Conner's agreement, effected no insurance themselves. James Conner died May 30, 1861. His executors and Mr. Lawrence, to whose individual name the policy made the loss payable, assigned all their claims to the plaintiffs. In August, 1862, the premises were destroyed by fire. At that time Conner's leasehold interest was worth at least $2000. The plaintiffs thereupon claimed to recover the value of the building, and made proof of loss in their own name, and their claim having been refused, brought this action. The jury by direction of the court, found a verdict

for the plaintiffs for $5656.24. Exceptions ordered to be heard at the general term in the first instance.

Jno. E. Parsons, for the plaintiff. I. As between Conner and the plaintiff, he was obligated to keep the demised premises insured for their benefit, to the amount of $5000. The policy in question either accomplished this, or it did not. 1. If it did, then the defendants are liable; and it matters not whether to the plaintiffs, or to Mr. Lawrence individually, or to Conner, or his representatives, as all assign to the plaintiffs. 2. If it did not, then Conner, having failed to discharge his obligation, was liable himself to the plaintiffs, as insurer. An action lies against one who voluntarily, though without compensation, undertakes to obtain insurance for another, but proceeds so negligently and unskillfully that the policy is worthless. (*Wilkinson* v. *Coverdale*, 1 *Esp.* 75.) *A fortiori*, where a full consideration passes for the agreement to effect the insurance. (*Keane* v. *Brandon*, 12 *La. An.* 20.) 3. And this liability of Conner gave him an insurable interest in the demised building to the amount payable by him in the event of its destruction, to wit, the amount of the policy, $5000; which was covered by a policy purporting simply to insure the building. *The N. Y. Bowery Fire Insurance Company* v. *The N. Y. Fire Insurance Company*, (17 *Wend.* 359,) can not be distinguished in principle from the present case. The Bowery Fire Insurance Company having insured the goods of Joseph Mortimer, to protect themselves reinsured with the New York Fire Insurance Company by a policy not adapted to a case of reinsurance, but in the ordinary form, simply substituting "reinsure" for "insure," and describing the property as belonging to Joseph Mortimer. Held that the liability of the former company constituted an insurable interest in the goods, and that the second policy properly insured, in language similar to the first, the goods, instead of describing the real interest cov-

ered. In *Crowley* v. *Cohen*, (3 *B. & Ad.* 478,) carriers responsible for goods, effected an insurance "on goods." Held, sufficient to protect their interest, *i. e.* their liability; "for, in general, if the subject matter of insurance be rightly described, the particular interest in it need not be specified." In *Walker* v. *Maitland*, (5 *B. & Ad.* 171,) it was held that the owner of a vessel answerable for loss by fault of boatmen employed in bringing the cargo from shore, may insure "the goods." (*See also Flint* v. *Flemyng*, 1 *B. & Ad.* 45; *Ætna Ins. Co.* v. *Jackson*, 16 *B. Monroe*, 242; *Chase* v. *Wash. Mut. Ins. Co.*, 12 *Barb.* 595; *Van Natta* v. *Mut. Security Ins. Co.*, 2 *Sandf.* 490.) 4. The insurance was in fact, as stated in the policy, "on the building," to the extent of Conner's interest, and without reference to ownership. The manifest intention of the policy was that the defendants would pay $5000 if the building were destroyed, unless in the possibility of no insurable interest. The four later receipts state the words "on building." "His," in the policy, ("on his six story brick building,") merely describes the property, and "is not equivalent to a warranty on the part of the assured that he is the owner of the same; * * * on the happening of a loss he will recover according to his real interest." (*Niblo* v. *The North Am. Fire Insurance Co.*, 1 *Sand. S. C. R.* 551. *Fletcher* v. *The Commonwealth Insurance Co.*, 18 *Pick.* 419.) 5. Conner's liability and resulting insurable interest were not lessened by the delivery of the policy and receipts to Mr. Lawrence. The defendants may make some such claim. Conner's agreement was absolute; not to deliver a policy, but to maintain an effectual insurance. Nothing could discharge him but performance, or positive release. Conner's handing the policy to Mr. Lawrence could not estop the plaintiff. Conner was equally able to see whether, and upon him was it incumbent to see that the policy did accomplish its purpose. Misrepresentation by Conner, concealment, his subsequently increasing the risk, and many other things of which the plaintiff could not know,

might vitiate the policy; nothing but direct testimony could show that the plaintiffs intended to discharge Conner and take such a risk. The presumption in such a case always is of a means of fulfillment, not of fulfillment. (*Johnson* v. *Weed*, 9 *John.* 310. *Vail* v. *Foster*, 4 *N. Y. Rep.* 312.)

II. There is another view in which we submit the plaintiffs are entitled to recover. The policy was, in fact, taken out by Conner for the benefit of the plaintiffs. They are therefore the insured, and can recover on their own interest. *Kernochan* v. *The New York Bowery Fire Insurance Co.*, (3 *Smith*, [17 *N. Y. Rep.*] 428,) establishes this principle. There the policy was to Kernochan as mortgagee. The court of appeals held that evidence was properly admissible to prove an arrangement not known to the company, between the mortgagors and mortgagee, that the mortgagee should keep an insurance for the benefit of the mortgagors, who should pay the premium; and the court, by their decision, gave the mortgagors the benefit of the policy, though only in the name of the mortgagee. (*Hough* v. *City Fire Ins. Co.*, 29 *Conn. R.* 10. *Wake* v. *Harris*, *Exchequer Chamber*, *Transcript*, *of May* 16, 1863.)

III. In addition to his above interest; or, should that fail, independently of it, Conner had a leasehold interest to the amount of $2000, directly within the terms of the policy. (*Niblo* v. *The North Am. Fire Ins. Co.*, 1 *Sand., S. C. Rep.* 551.) It is objected that Conner should have represented the character of this leasehold interest, and had it expressed in the policy. There is no evidence that he did not represent it. On the contrary, the mention of Mr. Lawrence indicates that a special statement was made to the company. And if he did, or rather, unless it is proved he did not, the company who drew and executed the policy, expressed in it what they chose, and waived the expression of what they saw fit to omit. (*Hall* v. *People's Mutual Fire Insurance Co.*, 6 *Gray*, 185.) Conner's insurable interest (even his leasehold interest, but for, and perhaps notwithstanding the

special mention of it, in the condition) was "absolute." "Not absolute," was intended to apply to the "property held in trust or on commission," &c. mentioned immediately before. The answer admits compliance with all the conditions of the policy.

IV. The defendants have received on the policy in suit $737.50 in premiums. They both claim that the policy never attached, for want of an insurable interest in Conner, and to retain the premiums. Should the court affirm the former claim, the plaintiffs, under their assignments from the parties who paid the premiums, must have judgment for their return. Their complaint so asks. Where risk never attached, the premium must be returned, if there was no fraud. (*Clark* v. *Manufacturers' Ins. Co.*, 2 *W. & Minot, C. C. R.* 472.) In that case there had been renewals running back many years. The policy was held void for non-compliance with warranty in original application. Plaintiff held entitled to return of all premiums.

V. Conner's liability and consequent interest on his death passed to his representatives. By his death the policy did not lapse. In case of death, the policy and interest therein continue to the representatives. (*Lynch* v. *Dalzell*, 4 *Br. Parl. Cases*, 431.) The defendants received premium from them and renewed to them, though in his name, after Conner's death.

VI. The plaintiffs should have judgment on their verdict, overruling the defendant's exceptions.

Banks & Anderson, for the defendants. I. The recovery in this action, if there be any, must be either a recovery of James Conner's loss, which has become vested in the plaintiffs by assignment, or by virtue of their relations to James Conner; or else it must be a recovery of the loss sustained by the plaintiffs themselves, on the ground that the evidence shows the insurance to have been in effect an insurance of the plaintiffs. Reserving an examination of this latter pro-

position, let us consider the plaintiffs as suing on the rights of James Conner.

II. The recovery on a policy of insurance must always be in conformity with the terms of the policy. There can be no recovery in this case on account of deficiency of proof of loss. There is no evidence in the case of the filing of any proofs of loss, except the allegation of the complaint at folios 17, 18. At folio 19, it is alleged that the defendants objected to pay the loss, on the ground that the policy only covered the interest of James Conner. The policy requires a statement, signed by the assured, of his own loss; also, the oath of the assured himself, and other requirements; none of these have been complied with in this case.

III. There is no evidence in the case of the extent of James Conner's loss. The proofs, even if regular in other respects, only show the value of the building destroyed. The evidence shows the nature of Conner's interest to have been a leasehold. As a tenant, the measure of his loss was the value of the occupation of the premises for the unexpired portion of his term. (*Niblo* v. *North Am. Ins. Co.*, 1 *Sandf.* 551.) The evidence as to the value of the unexpired term is entirely too vague to support a recovery; and besides, is fatally defective in not being supported by any preliminary proof of loss. Where one having a special insurable interest insures, his recovery is limited to the amount of his interest. (*Niblo* v. *North Am. Ins. Co.*, 1 *Sandf.* 551. *Phillips on Insurance*, § 309. *Russell* v. *Union Ins. Co.*, 1 *Wash. C. C. R.* 409. *Wolff* v. *Horncastle*, 1 *B. & P.* 316. *Lynch* v. *Dalzell*, 3 *Br. Par. Cas.* 49.) All cases that appear to be at variance with this will be found on examination to be insurances effected for account of the assured *and whom it may concern*, or words to that effect, and to base the recovery on a construction of the contract by which the assured is made trustee for the owners. Insurances effected by consignees in possession are upheld upon the same ground.

IV. The policy lapsed on the death of James Conner His death transferred his interest to his legal representatives, and unless it be maintained that insurance companies remain liable to all assignees, by operation of law, it must be admitted that the policy terminated on the death of the assured. There is no evidence in the case that at the time of the receipt of the premium paid September 4, 1861, the defendants knew of James Conner's death.

V. James Conner had forfeited all rights under the policy by omitting to indorse the nature of his interest. This is positively provided for by the third stipulation in the policy. As to the effect to be given to these stipulations, see *Gilbert, receiver*, v. *Phœnix Ins. Co.*, (36 *Barb.* 372;) *Jube* v. *Brooklyn Fire Ins. Co.*, (28 *id.* 412;) *Bigler* v. *N. Y. Central Ins. Co.*, (20 *id.* 635.)

VI. The objection to the plaintiff's claim, noted in the last point, is fatal to any form of recovery on the basis of James Conner's rights, and whether the measure of his rights be that of a tenant or of an agent for the plaintiffs, or of a re-insurer. The objection is to the very origin of the contract; the policy was still-born and no possible action can be maintained in connection with it unless, perhaps, for a return of premiums.

VII. The plaintiffs have endeavored to enlarge the measure of James Conner's right of action by bringing this case within the principle of the *N. Y. Bowery Fire Ins. Co.* v. *The N. Y. Fire Ins. Co.* (17 *Wend.* 359.) They have argued that it being admitted that an insurance broker who undertakes to effect an insurance, and who fails to do so, is liable as an insurer; and the case in Wendell settling that an insurer may re-insure, therefore Conner was liable as an insurer, and therefore he could re-insure the premises and recover the entire value thereof. (*a.*) Conner could not be held liable to the plaintiffs, because: 1. He was not an insurance broker. 2. He never undertook to insure the plaintiff's interest: on the contrary, the expression was: "He would make the in-

surance himself." 3. The plaintiffs, by retaining the policy and renewals for nine years are estopped from claiming that they were not in the form agreed upon. (*b.*) Granting his liability, it can not be claimed that as a re-insurer he can have any greater rights than as an insurer, and therefore the objections above noted to the validity of the policy apply with undiminished force. (*c.*) If Conner is liable to the plaintiffs, it must be on the theory that he has neglected to insure, and in that case we can not be liable. If he is not liable, then he could not have an interest as an insurer, and could not recover from us.

VIII. It is claimed that this action can be maintained within the principle that all principals can avail themselves of the acts of their agents in their behalf, even though their names have not been disclosed. But in all these cases the rights of the principal have always been limited to those acquired by the agent. (*See Gibson* v. *Winter*, 5 *B. & Ad.* 96; *George* v. *Claggett*, 7 *Term R.* 359; *Herckenrath and others* v. *The Am. Mut. Ins. Co.*, 3 *Barb. Ch.* 63; *Taintor* v. *Prendergast*, 3 *Hill*, 72; *Van Lien* v. *Byrnes*, 1 *Hill.* 133.) We do not object to the plaintiff's suing on James Conner's right; we only object to their claiming any other measure of recovery than would have been available to James Conner had he brought the suit.

IX. If it be claimed that the plaintiffs have a right to recover because the evidence shows that they were the real parties insured, we say this is in violation of all rules of evidence. (*Turner* v. *Burrows*, 5 *Wend.* 541. *Barnwell* v. *Marine Ins. Co.*, 2 *Cranch*, 419. *Phillips on Ins.*, §§ 383–391. *Atherton* v. *Brown*, 14 *Mass. Rep.* 152. *Grant* v. *Naylor*, 4 *Cranch*, 224. *Allison* v. *Rutlege*, 5 *Yerg.* 193. *Lamatt* v. *H. R. Ins. Co.*, 17 *N. Y. Rep.* 199. *Jube* v. *The Brooklyn Fire Ins. Co.*, 28 *Barb.* 412.)

X. There is nothing in the case of *Kernochan* v. *N. Y. Bowery Fire Ins. Co.*, (17 *N. Y. Rep.*, 478,) that will support a recovery in this case. It only decides that the

insurance of Kernochan mortgagee, gives Kernochan an insurable interest, and that the fair construction of such an agreement, in view of the known practice of the mortgagee's holding the policy is, that the measure of damages would be, not the loss of the debt, but the damage to the buildings.

It is not pretended that had the assured done anything to invalidate the policy, he would nevertheless recover on the ground that the policy was really meant to insure the interest of the mortgagor. On the contrary it is stated, page 491, that if A. insured in his own name the interest of B. without disclosing it, neither can recover: not A. because he has no interest; nor B. because he is not insured.

XI. There can be no judgment for a return of premiums. 1. Unless the policy was void *ab initio* there can be no ground for the claim. 2. In case of this kind, a demand must be alleged and proved before the action can be maintained.

XII. The verdict should be set aside and judgment ordered for the defendants, or a new taial ordered.

By the Court, J. F. Barnard, J. The complaint avers the performance of all the conditions on the part of the insured, and that the defendant declined to pay the loss suffered, on the specific ground that James Conner, in whose name the policy was effected, did not own the building covered by the policy. This is not denied in the answer and is consequently as to the action admitted. The plaintiff was not bound to affirmatively prove on the trial the service of any preliminary loss papers.

James Conner, by the terms of his lease, agreed to pay the necessary premium of insurance to enable the lessors to keep the premises insured for the benefit of the said lessors, to the amount of five thousand dollars. At the execution of this lease there was a policy on the property in another company. When it expired, Conner asked to change the company, "that he could get it done cheaper." He agreed

verbally to keep the property insured for the trustees to the extent of five thousand dollars. He agreed to keep that insurance for the plaintiffs. This agreement made him liable to the plaintiffs for a breach of that agreement, and gave him an insurable interest in the property to that extent. He effected the policy in suit as on "his" (Conner's) building, loss, if any, payable to John W. Lawrence, who was the acting trustee for the property. I do not think the word "his" in the policy, is a warranty of title to the property. If he had an insurable interest it was his for the purpose of indemnity, to the amount of his interest. He could insure that interest. (17 *Wend.* 359.) This insurable interest may be shown by parol to exist, and without the knowledge of the defendants. (*Kernochan* v. *The N. Y. Bowery Fire Ins. Co.*, 17 *N. Y. Rep.* 478.) The defendants must indemnify the assured if he in fact have an interest.

Besides, I think the plaintiffs are entitled under all the facts in this case to recover on the policy as insuring them. Conner was bound to pay the premium on $5000. He agreed to insure the property for the trustees. He obtained this policy "loss payable to John W. Lawrence." What is the defendants' contract? It agrees to pay Conner nothing. It agrees to pay the loss to the plaintiff. The property was in fact insured for the plaintiff. It is a contract with James Conner, that in consideration of the premium paid by him, the company would insure a certain building and pay the loss to the owner.

I think the judgment should be entered with costs, on the verdict.

[Kings General Term, February 8, 1865. *Lott, J. F. Barnard* and *Scrugham*, Justices.]

43 490
46 682

SCHIELLEIN *vs.* THE BOARD OF SUPERVISORS OF THE COUNTY OF KINGS.

The object of the notice required by the act "to provide for compensating parties whose property may be destroyed in consequence of mobs or riots,' passed April 13, 1855, to be given to the sheriff, was for the purpose of protection, only.

It was not intended to restrict the action against a city or county to such persons as shall give notice to the sheriff that their property is threatened and in danger from rioters, if such notice would be useless for the purpose of protection.

The statute should be so construed that if a party is informed of a threat, and have time to notify the sheriff, so that he can take all legal means to protect the property, then the omission to give the notice is fatal.

THIS action was brought for damages resulting from the destruction, by a mob, composed for the most part, of soldiers, on the 7th day of December, 1862, of a building and contents belonging to the plaintiff. The property was situated at East New York, in the county of Kings. The action is founded on the act of the legislature, entitled "An act to provide for compensating parties whose property may be destroyed in consequence of mobs or riots," passed April 13, 1855. (*Laws* 1855, *chap.* 428.)

The plaintiff testified that he fled from his home before it was destroyed; giving as a reason for so doing, that he was informed that the crowd were going to pull his house down and hang him; and that he left his house about five or ten minutes afterwards. He also admitted that he did not give the sheriff notice that his property "was threatened and in danger from rioters," and did not know it was necessary. The office of the sheriff was at No. 14 Court street. The county jail was nearer East New York, within three quarters of an hour of the plaintiffs' house by the city cars.

Among other things, the court, under exceptions, charged the jury a follows: "There is another qualification of the plaintiff's right to recover. If there was sufficient time after he was apprised of any threat or attempt so to destroy or injure his property, in the exercise of due dili-

gence, to notify the sheriff of this county of the facts which had been brought to his knowledge, so as to have enabled him, on receipt of such notice, to take proper measures to protect the property, then his omission to do it would deprive him of all claim on the county. On this branch of the case the jury were to take into consideration the distance between the plaintiff's residence and that of the sheriff, and the time that would reasonably be necessary to give such notice, and enable the sheriff to take the appropriate legal means, such as raising a posse or the requisite force, taking the necessary measures to prevent the injury; and if, upon the whole evidence, they were satisfied that there was sufficient time for that purpose, then, as the plaintiff has not given any notice, or made any attempt to give it, he can not recover; but on the other hand, if the time was insufficient, then the mere omission to notify the sheriff, or to make any attempt to do so, will not be a bar to a recovery."

The jury rendered a verdict for the plaintiff for $2000, and the court thereupon ordered the exceptions to be heard in the first instance at a general term.

Britton & Ely, for the plaintiff.

J. M. Van Cott, for the defendants.

By the Court, J. F. Barnard, J. The object of the notice required by the act "to provide for compensating parties whose property may be destroyed in consequence of mobs or riots," passed April 13, 1855, was for the purpose of protection only. The notice is given to the sheriff, who can exert the power of the county if necessary. It is made this officer's duty to take all legal means to protect the property, and if he neglect or refuse he is made individually liable for the damages sustained by the person who shall have given him notice. It is not intended to restrict the action against a city or county to such as shall give notice

to the sheriff, if such notice be useless for the purpose of protection. The statute must receive a reasonable and liberal construction.

The refusal to charge that if the plaintiff could have given the notice to the sheriff after he left his premises and before they were destroyed by the mob, was right. It is not information to the sheriff, but protection from him which is to result from the notice.

The defendant further requested the court to charge that if the plaintiff, after leaving his premises and before they were fired, had time to give notice to the sheriff and the sheriff might by possibility or probability have arrived in time to prevent some portion of the injury, or arrest any of the rioters, the plaintiff could not recover. The court refused so to charge, and that is alleged as error. I think not. It is not the possibility or probability that a sheriff might arrive in time to save the smallest portion of the plaintiff's property or to arrest a rioter, that should destroy the plaintiff's claim against the county. The act should, I think, be construed so that if a party is informed of a threat and have time to notify the sheriff so that he can take all legal means to protect the property, then the omission to give the notice is fatal; and this the judge charged fairly.

Judgment affirmed with costs.

[Kings General Term, February 8, 1865. *Lott, J. F. Barnard* and *Scrugham*, Justices.

LUDLOW *vs.* THE VILLAGE OF YONKERS.

In an action against a municipal corporation for negligence in the construction of a wall, in consequence of which the wall fell down and injured the plaintiff's mill, the damages recovered should be only for the actual injury sustained by the plaintiff, with interest from the time of the injury.

If rent of the building injured is recoverable, it can only be for such time as was necessary to repair the premises and restore them to their usefulness.

It seems that where a municipal corporation undertakes, though voluntarily, to construct a drain to receive the drainage from a street and convey it across the land of an individual, it is bound to do the work skillfully.

THE corporate authorities of the village of Yonkers graded, curbed and guttered a street along the plaintiff's land. The point of discharge from the gutters was upon the plaintiff's land. The defendant, at the request of the plaintiff, constructed an open drain to receive the drainage from the surface of the street and convey it across the plaintiff's land to the Hudson river, and to do this erected a sustaining wall to support the embankment on which this open drain was constructed. This wall proved insufficient for the purpose for which it was built and fell down and injured the mill of the plaintiff. This injury was done to the mill in 1861. The wall has not since been repaired, nor has the mill been restored or used. The plaintiff in 1863 brought his action against the defendant for negligence in the construction of the wall, and in the latter part of 1864 had a report of a referee in his favor for the injury done to the mill by the falling of the wall and for rent of the mill from the injury down to the time of the trial; and from the judgment entered on that report the defendant appealed.

Marsh, Coe & Wallis, for the defendant and appellant.

S. E. Lyon, for the respondent.

By the Court, J. F. BARNARD, J. From a careful examination I think this judgment can not be sustained. The damages should be only the actual injury sustained by the

plaintiff, with interest from the time of the injury. If rent is recoverable, it would only be for such time as was necessary to repair the premises and restore them to their usefulness The plaintiff can repair at his pleasure. He has not yet repaired, and has recovered rent from 1861 down to the trial, and perhaps to the date of the referee's report in 1864. There is no proof on which this rent can be recovered. The plaintiff can not, by neglect to repair, charge the defendant for rent to the extent of time permitted by the statute of limitations. It is not therefore necessary to discuss the questions as to the liability of the defendant, under the evidence. I am inclined to think that the defendant was bound to do skillfully what it undertook to do even voluntarily. But assuming the liability, there must be a new trial at the circuit, costs to abide the event. New trial granted.

[Kings General Term, February 8, 1865. *Hogeboom, Lott* and *J. F. Barnard,* Justices.]

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THE PEOPLE, *ex rel.* The Metropolitan Bank, *vs.* THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY AND COUNTY OF NEW YORK.

A certiorari, to review an assessment made by the commissioners of taxes and assessments of the city and county of New York, will not lie after the assessment roll has been delivered by the commissioners to the board of supervisors, and the tax has been collected.

After the assessment roll has been delivered to the supervisors, the commissioners have no longer any control over the assessment, and can not correct or reduce it.

A certiorari will not be allowed, for the purpose of enabling a party, by procuring a reversal of the proceedings of the commissioners of taxes, to recover back, by action, money paid by him for taxes.

THE certiorari in this case was brought under section 20 of the act of April, 14, 1859, in relation to taxes and assessments in the city of New York, (*Laws of* 1859, *chap.*

302.) The relator is a banking corporation or association, whose capital stock is $4,000,000. It was assessed for the year 1863 on $3,672,970, as the valuation of its capital stock equal to its amount, after deducting the assessed value of its real estate and the amount of its stock held by a certain charitable institution. The relator applied to the commissioners to have this assessment corrected and reduced, on the ground that $3,100,000 of its capital was invested in stocks, bonds and other securities of the United States, and was exempt by law from taxation by state authority. The commissioners decided not to make, and did not make any deduction from the amount of assessed valuation. This decision was declared within thirty days after the application, and before the first day of May, 1863. The *certiorari* in this case was applied for and allowed on the 29th day of December, 1863. The assessment rolls were in fact delivered by the commissioners to the board of supervisors on the first Monday of July, 1863, as required by law. (*Act of April* 14, 1855, §§ 12, 13.) It was conceded, if the case was decided on the merits, that under the recent decision of the supreme court of the United States the decision or proceeding of the commissioners must be reversed; but it was insisted, on the part of the respondents, that the *certiorari* should be quashed, on the ground that it was allowed too late.

L. B. Woodruff, for the relators.

John E. Devlin and *Mr. Trull*, for the respondents, the commissioners.

By the Court, SUTHERLAND, J. It is perfectly plain that it would be a useless ceremony to decide this case on its merits, and reverse the decision or proceeding of the commissioners. The tax rolls for 1863 were delivered to the board of supervisors on the first Monday of July in that

year, and it must be presumed that the tax of which the relator complains has long since been paid or collected.

The points of the counsel for the relators are drawn with extreme ingenuity. He commences by assuming that the statute (§ 20 of the act of 1859) by virtue of which the *certiorari* was allowed, fixes no limit to the time within which it may be brought, and that therefore whenever brought or presented, the relator is entitled to have the record which it brings up reviewed and considered, and disposed of on its merits.

If it was the intention of the legislature, by section 20 of the statute, to give the aggrieved party a right to a *certiorari* to review and correct the decision or action of the commissioners at any time, or any number of years after their decision or action, and after the tax has been paid or collected, why then, indeed, the court must hear and decide the case on its merits, irrespective of the time of the application for, or allowance of, the *certiorari*, and irrespective of the question whether the reversal of the decision or action of the commissioners will be of any use to the relator. The court could not probably refuse to carry out the intention of the legislature, on the ground that it would be useless to do so.

But it is not to be presumed that the legislature intend to pass an idle law, or to give a valueless statutory right, or to compel courts to render useless judgments; hence, on the question of intention, on the question of the construc- of § 20 of the statute, giving the right to a *certiorari*, on the question whether the legislature did or did not intend that the *certiorari* given by that section should be applied for, allowed and served, before the assessment rolls were delivered by the commissioners to the board of supervisors on the first Monday of July, as required by section 13 of the act, the consideration that it would be a useless ceremony to reverse the decision or action of the commissioners in this case must and should have great weight.

The statute gives the *certiorari* as a matter of right, and

there is indeed in express words no limitation of the right in point of time; but the question is, looking at the whole statute, and the purpose of the *certiorari*, was it not the intention of the legislature that the *certiorari* should be applied for, allowed and served before the time fixed by the statute (§ 13,) for the assessment rolls leaving the hands of the commissioners? After that, the commissioners have no longer any control over the assessment complained of, and can not correct or reduce it.

If the aggrieved party has a right to the *certiorari* after the delivery of the assessment rolls to the board of supervisors, he has a right to it twenty years after, and after he has voluntarily paid the tax, and whether he has voluntarily paid the tax, or paid it on compulsion.

Now I have said that it was plain that it would be a useless ceremony to reverse the proceeding or action of the commissioners after the assessment rolls had been delivered to the board of supervisors and the tax complained of had been paid or collected.

The counsel for the relator cites many New York cases to show that the proceeding or action of the commissioners sought to be reviewed or reversed, being judicial in its character, sustains the subsequent proceedings for the collection of the illegal tax from the relator. These cases (*Weaver* v. *Devendorf*, 3 *Denio*, 117; *Matter of Mount Morris Square*, 2 *Hill*, 14; *Vail* v. *Owen*, 19 *Barb.* 22, *and many others*) show that no action will lie against the commissioners, though the supreme court of the United States has pronounced their proceeding erroneous and the tax illegal. He also cites many Massachusetts cases, (*Boston* v. *S. Glass Co.*, 4 *Metcalf*, 181; *Dow* v. *Sudbury*, 5 *id.* 73, *and many others*,) to show that money collected on an illegal assessment can be recovered back; and he might have cited an earlier Massachusetts case, (*Amesbury W. & C. Manufacturing Co.* v. *Inhabitants of Amesbury*, 17 *Mass. R.* 461,) holding con-

trary, I think, to the whole tenor of the English cases, and of the New York cases, (*see Fleetwood* v. *The Mayor, &c.* 2 *Sandf.* 481, and the very recent case *The Commercial Bank of Rochester* v. *The City of Rochester*, 42 *Barb.* 488,) that an illegal tax voluntarily paid could be recovered back; but he fails to cite any case to show that the formal reversal of the proceeding or action of the commissioners in this case will or can in any way the least affect the question of the relator's right to recover back the money paid or collected on the illegal assessment, or that such reversal can or will in any way authorize, aid, or affect any action or right of action for that purpose.

The Massachusetts cases show too much for the counsel's purpose; for they show that actions could be brought, and were brought and sustained, without any reversal of the action or proceedings of the assessors on *certorari* or otherwise. Indeed, no principle can be suggested, upon which our reversal of the proceeding or action of the commissioners now, can or will be of any use to the relator, in any action to recover back the money paid by it or collected of it. The counsel for the relator fails to cite any case or to suggest any principle to show that the reversal of the proceedings of the commissioners now, after the tax has been paid or collected, will remove an obstruction in the way of recovering the money back. He seems to doubt, himself, whether the reversal now would be of any importance, for the language in one of his points is: "But it may be of vital importance that the record of the judicial act which determines the value of the relator's taxable property should first be corrected." His points fail to show that the reversal or correction of the action of the commissioners now, would be of the least importance. He does not suggest, and I think no one would suggest, that such reversal would sustain or aid an action against the commissioners for a judicial error, or against any officer or collector, for collecting the tax under a warrant regular on its face.

The question whether the relator has any remedy by action against the city, or commissioners, or officer collecting the tax (if it was collected, and not voluntarily paid) is not before us, and we do not intend to express or intimate any opinion on that question; but the question as to the uselessness of reversing the proceeding or action of the commissioners on *certiorari*, brought after the assessment rolls have been delivered to the supervisors, and after the tax complained of has been paid or collected, is before us, as having a very important bearing on the construction of the provision of the statute giving the right to the *certiorari*, for it is not to be supposed that the legislature intended to give the right to a *certiorari*, after and when it could be of no use. In the case of the *Commercial Bank of Rochester* v. *City of Rochester*, (42 *Barb.* 488,) before cited, it was not suggested either by counsel or court, that the non-reversal of the proceeding or action of the assessors on *certiorari* stood in the way of a recovery.

The words of the provision are: "A *certiorari* to review and correct on the merits any decision, &c. shall be allowed by the supreme court or any judge thereof, &c. and shall, with the return, be heard and decided forthwith by said court in preference to all other matters, actions or proceedings." The latter words of this provision tend to show, I think, that it was the intention that the *certorari* should be applied for, allowed and served, at least before the assessment rolls were delivered to the board of supervisors.

The books containing the assessed valuations are to be kept open for inspection and for applications for correction, from the second Monday of January until the first day of May in each year, (§§ 8, 9 and 10,) and the decision of the commissioners, on the application for correction, is to be declared within thirty days after the application. (§ 10.) If then the application is made on the last day of April, and the decision is declared within thirty days thereafter, the assessment rolls must remain in the hands of the commissioners

for at least thirty days after the decision ; and considering that there is a special term of the supreme court in this judicial district constantly in session, and that regularly no doubt, the *certiorari* being under the statute, could be made returnable at special term, it would appear that ordinarily there would be no difficulty in having the *certiorari* allowed, and served, and a return made, and decided within the thirty days, and before the assessment roll left the commissioners.

Moreover, the provision of the statute, (§ 10,) that no reduction shall be made by the board of supervisors, unless it shall appear, under oath, that the party aggrieved was unable to attend within the period prescribed for the correction of taxes by reason of sickness or absence, &c., certainly shows that all the corrections to be made except in case of sickness or absence were to be made by the commissioners, and certainly tends to show, also, that it was the intention that the corrections should be made before the assessment rolls were delivered to the board of supervisors.

The foregoing considerations, I think, reasonably lead to the conclusion that the legislature never intended that the *certiorari* might be applied for and allowed after the assessment rolls were delivered to the board of supervisors ; certainly not, after the tax complained of had been paid or collected.

But take another view of the question of construction.

Concede that the judicial nature of the proceeding or action of the commissioners stands in the way of any action by the relator to recover its money back, and that our reversal of such proceeding or action will enable the relator to recover its money back by action ; can it be supposed that the legislature intended to promote and encourage said litigation for such purpose, and intended to enable a party long, or any length of time, after the payment or collection of the tax, to recover back money received or collected for public use by and under its own authority ? The considerations of public policy which controlled the discretion and decisions

of the court in *People*, ex. rel. *Church*, v. *Supervisors of Allegany*, (15 *Wend.* 132;) *People*, ex. rel. *Onderdonk*, v *Supervisors of Queens*, (1 *Hill*, 195;) *Fitch* v. *Commissioners of Kirkland*, (22 *Wend.* 132,) and *Mott* v. *Commissioners of Highways of Rush*, (2 *Hill*, 472,) when the common law writ of *certiorari* was applied for or allowed, apply with all their force to the question of construction in this case.

My conclusion is that the *certiorari* should be quashed, with costs.

Judgment accordingly.

[New York General Term, February 6, 1865. *Ingraham*, *Clerke* and *Sutherland*, Justices.]

Shaffer *vs.* Mason.

An attachment can not issue as a provisional remedy, under section 227 of the code, in an action of trespass for taking and carrying away personal property, the claim being for damages not ascertained, but to be assessed by a jury.

THIS is an action of trespass, for taking and carrying away certain articles of personal property. An attachment was issued under the code, on affidavit, alleging the trespass, and that the property was of the value of seven hundred dollars, and that the defendant was a non-resident. The attachment directed property to be attached sufficient to satisfy the plaintiff's demand of seven hundred dollars. On motion of the defendant, the attachment was vacated at special term, on the ground that the code does not authorize an attachment, as a provisional remedy, in an action of tort. The plaintiff appealed.

L. S. Chatfield, for the appellant.

D. McMahon, for the respondent.

SUTHERLAND, J. I think the order at special term vacating the attachment was clearly right. The words of section 227 of the code are certainly very broad. That section allows the property of the defendant to be attached "in the manner hereinafter prescribed," in an action "for the recovery of the money" against a defendant, who is not a resident of this state. Prior to 1857, this section read "in an action for the recovery of money." The section was amended in 1857, by inserting the article *the* between of and money, and by inserting other words in another part of the section, allowing an attachment to issue on the ground that the defendant was about to remove, secrete or dispose of his property with intent to defraud his creditors. Both amendments may be considered as a legislative construction of the section, to the effect that the attachment was allowed only where the action was for a money demand on contract.

If any significancy or effect is to be given to the amendment by inserting the definite article *the*, the insertion of that word was intended to limit or define the general signification of the word money, so that the words "the money" must now mean the money demanded in the summons in the action. (*See* § 129, *sub.* 1.)

The other amendment, in 1857, also goes to show that the attachment was to issue only in cases where it was claimed by the plaintiff that the defendant was indebted to him.

But independent of these considerations I am satisfied, upon looking at the whole of section 227, and other sections, particularly sections 229, 231, that it was not the intention that the attachment should issue in an action for a trespass, where the claim is for damages to be assessed by a jury. By section 229, "the warrant may be issued whenever it shall appear by affidavit that a cause of action exists against such defendant, specifying the amount of the claim and the grounds thereof," &c. These words plainly imply that the attachment is to issue only when the plaintiff can conscientiously specify and swear to the amount of his claim. How

can a plaintiff do that, in an action for an assault and battery, or libel, or trespass *de bonis*, when the very object of the action is, to have the damages (the amount he is entitled to recover) assessed and determined for him? Can it be supposed that the legislature intended, in such a case, that the plaintiff might preliminarily assess his own damages, at any figure he chose, and, having thus specified it, swear to it, as a claim which he has against the defendant for so much money; I think not. I think the code of procedure never contemplated such an extraordinary proceeding.

By section 231, too, the sheriff is to attach sufficient of the property of the defendant to satisfy the plaintiff's demand according to the complaint, together with costs and expenses. Without referring to other sections of the code, I will say that I concur generally in the views expressed by Justice Hogeboom, in *Gordon* v. *Gaffey*, (11 *Abbott's Pr. R.* 1,) and that I think his decision in that case was right.

Mr. Justice James, in *Floyd* v. *Blake*, (19 *How. Pr. R.* 542,) cites the beautiful poetical extravaganza, "He who steals my purse steals trash," &c., to show that a "good name," being so much more valuable than riches, it was reasonable that the law should afford "the same facilities for enforcing a judgment for an assault upon character, that it does for an assault upon the purse." Now as my reverence for Shakspeare is too great to permit me to deny that he may be cited even on a question of the construction of a section of the code, I will say that Shakspeare contrasts so forcibly and beautifully the stealing of a purse with the filching of a *good* name, and that the question is, whether the legislature intended a plaintiff in an action for a libel or slander to determine preliminarily that his name was good, and that he might set his own value upon it, and fix and swear to any amount in dollars that he chose, as the damages for filching it, and thus have sufficient of the property of the defendant attached at the commencement of the action, to secure the payment of that amount.

It is strange that the very ground upon which Judge Edmonds discharged the attachment in *Hernstien* v. *Matthewson*, (5 *How. Pr. R.* 196,) did not lead him to doubt the correctness of his construction of section 227 of the code.

I think the order appealed from should be affirmed, with costs.

INGRAHAM, J. Where the action is to recover the value of personal property, I see no reason why an attachment may not issue. I concur that the attachment should not issue in actions for torts against the person.

CLERKE, J. The words "creditors" can not be applied to the plaintiff in an action of tort.

Order affirmed.

[NEW YORK GENERAL TERM, February 6, 1865. *Ingraham, Clerke* and *Sutherland*, Justices.]

HOWE *vs.* DEUEL and others.

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The visitorial powers conferred upon the court of chancery by the article of the revised statutes (*vol.* 2, *pp.* 462, 463,) relative to proceedings against corporations in equity, can only be exercised by the supreme court on an application made at the instance of the attorney general, or of a creditor of the corporation, or of a director, trustee or other officer having a general superintendence of its concerns.

An action can not be brought, under the statute, by a *stockholder*, against the corporation and its trustees, to have the corporation dissolved, and restrained from the exercise of corporate powers; to restrain the trustees from exercising any powers as trustees; and for the appointment of a receiver and the sale of the property of the corporation.

Nor can the court entertain such an action, or grant the relief asked for, under its general powers as a court of equity.

In no case, except in respect to moneyed corporations, or insolvent corporations, can a stockholder have a receiver appointed, on a preliminary injunction, with authority to take entire possession of the corporation, and thereby work its dissolution.

Howe *v.* Deuel.

Yet, on the application of a stockholder, charging fraud against some of the trustees or directors, *it seems*, such directors or trustees may be restrained by injunction from committing any such fraudulent acts as are charged. But such injunction should apply only to the particular acts complained of, and not to the general business of the corporation.

APPEAL from an order made at a special term, granting an injunction and directing the appointment of a receiver. The facts appear in the opinion.

By the Court, INGRAHAM, P. J. The plaintiff as a stockholder of the Nevada Water Works Company, brought this action to procure a dissolution of the company, and asks for an injunction and a receiver. The corporation is organized under the act for the incorporation of manufacturing and mining companies, of this state, but its business is carried on in another state. The plaintiff charges a conspiracy to cheat and defraud himself and other stockholders, by a majority of the trustees, and prays that the company may be dissolved and may be restrained from the exercise of corporate powers; that the defendants, the trustees named, may be restrained from exercising any power as trustees; that a receiver may be appointed; that the property of the corporation may be sold, and after paying the debts of the company may be divided among the stockholders; that the trustees who are made defendants may be compelled to pay all moneys belonging to the company received by them and not paid over, and that an account thereof be taken; and that the plaintiff recover against such trustees the damages sustained by him and the other stockholders, who may come in and contribute to the expenses of this action.

Upon the filing of this complaint a motion was made, on notice, for an injunction and the appointment of a receiver, and an order was made at special term appointing a receiver, directing the delivery to him of all the books, property and effects of the company, and all the property, works, &c. of the company whether in this state or in California,

or elsewhere. And the company was further ordered to convey to the receiver all the property of the corporation, and the receiver was authorized to carry on the business of the company in California. The defendants who were trustees, and the company itself, were also restrained from interfering with the management of the business and affairs of the company, and from receiving any of the debts due the company, or any part of its income. From this order the defendants appealed.

It is very evident from the prayer of the complaint and the provisions of the order appealed from, that this complaint and the proceedings thereon are framed and taken under the provisions of the *Revised Statutes*, 2*d vol. pp.* 462, 463. The court is asked to exercise all the visitorial powers conferred on the court of chancery by that chapter. Such powers can only be exercised on an application made at the instance of the attorney general, or of a creditor of such corporation, or of a director, trustee or other officer, of such corporation, having a general superintendence of its concerns. (*Sec.* 35.) As this action is brought by a stockholder merely, it is very evident that it can not be sustained under these provisions of the statute. These are the only visitorial powers bestowed on the court under the revised statutes, and if the proceedings at the special term can be sustained at all it must be under the general powers of the court as a court of equity, or under some special statutory provision authorizing such proceedings.

In *Lattimer* v. *Eddy*, before the general term of this district, in which the application was for an injunction and receiver, it was held that there was no authority to suspend all the business of the corporation in this manner, and a doubt was expressed whether the injunction could be granted without appointing a receiver, with power to carry on the business in California. I am not prepared to assent to all the propositions so stated, in a case brought under the provisions of the revised statutes to which I have referred In

such a case very full powers are given to the court to compel delinquent trustees to account for their official conduct, to pay for moneys acquired by violation of their duties, to suspend trustees from acting when they have abused their trust, and to order new elections to fill their places. The power to appoint a receiver, in such cases, appears to be limited to a period after judgment at law, or a decree in equity be recovered against the corporation. (*Sec.* 36.) It is not, however, necessary for me to examine further that decision, as the plaintiff here does not bear the relation to the corporation which he necessarily should do to enable him to invoke the visitorial powers of this court. Besides, that decision being a decision of the general term, is binding upon the court until reversed either by a general term or the court of appeals, and I must therefore consider it the law of this court. I conclude, therefore, not only under that decision, but also for the reason that the plaintiff does not belong to any of the classes enumerated in the statute who may bring such an action, that the plaintiff can not maintain this action under the provisions of the revised statutes referred to.

It only remains to inquire whether the court, under its general powers as a court of equity, can make the order appealed from. I had occasion, in January last, at special term, to examine the question as to the power of the court to appoint a receiver, before judgment, in an action by a stockholder against the trustees or directors of a corporation, and then came the conclusion that no such power existed, either under the revised statutes or under the code, before judgment, except in case of insolvency or on the application of creditors to enforce payment of their demands. The 244th section of the code prescribes the various cases in which a receiver may be appointed. So far as that relates to a corporation, the 4th subdivision is alone applicable where the order is intended to suspend the business of the corporation. That only applies to cases where the corporation has been dissolv-

ed, is insolvent, or in immediate danger of insolvency, or has forfeited its corporate rights.

Other provisions which relate to monied corporations need not be examined, because they are not applicable to this company. That the court has power to restrain a corporation, or its trustees or directors, by injunction, from doing any act in violation of its charter, or in misapplying the funds of the corporation, I have no doubt but it must be against such specific acts, and not to enjoin them from carrying on the legitimate business of the corporation. Nor can I doubt the power of the court, in like manner, to restrain trustees or directors from fraudulent dispositions of the corporate property, or a misapplication of the funds. (*Robinson* v. *Smith*, 3 *Paige*, 222. *Munt* v. *The Shrewsbury and Chester Railway Company*, 3 *Eng. Law and Eq. R.* 144.) Various cases may be found cited in *Hoffman's Pr. R.* (*pp.* 267, 268,) to the same effect. But I have been unable to find any cases where, except in regard to monied corporations or insolvent corporations, a stockholder may have a receiver appointed on a preliminary injunction, with authority to take entire possession of the corporation, and thereby work its dissolution. It is said in this case the plaintiff asks for such dissolution. This is so, in the complaint, but such an application can only be made by the attorney general; (*Code*, § 430; *Smith* v. *Metropolitan Gas Light Co.*, 12 *How. Pr. Rep.* 187;) or by the parties specified in section 35 of the revised statutes, above referred to.

I do not think in this action any such dissolution can be ordered, and therefore the appointment of a receiver with a view to that result, would be improper.

But while I am of the opinion that a receiver should not be appointed to take possession of the property of a corporation on the application of a stockholder charging fraud against some of the trustees or directors, I see no reason why such directors may not be restrained by injunction, from committing any such fraudulent acts, on the application of a stockholder; but

such injunction should not apply to the general business of the corporation, but to the particular acts complained of. The acts alleged in the complaint, if truly charged against the defendants, show gross violations of duty on their part, and an injunction prohibiting any such use of the corporate property might well be granted; but I see no ground on which the injunction against carrying on the general business of the company can be sustained.

My conclusion is that the order appealed from should be reversed, with $10 costs, without prejudice to an application at special term for an injunction against the particular act complained of.

[New York General Term, February 6, 1865. *Ingraham, Clerke* and *Sutherland*, Justices.]

Palmer *vs.* Myers and others.

When a partner absconds, he abandons the business of the firm, and leaves the management of the affairs of the partnership with the remaining members; and such act is to be construed as vesting in them full authority to do whatever is necessary to pay the debts and settle up the business of the firm.

Hence they may execute an assignment of the partnership property in trust, for the benefit of creditors, without the assent of the absconding partner.

THIS action was brought to set aside an assignment for the benefit of creditors, upon the ground that only two of the three partners, comprising the firm, actually executed the same, without the assent of the third. Other points were raised upon the trial which were not presented on this argument. The defendants relied on the defense that the partner who did not sign the instrument had, before its execution, absconded from the city. Upon the trial they offered to prove such absconding, and that the absconding partner, Johnson, had executed an assignment in Massachusetts, with-

out the consent of the other members of the firm, and that at the time of making the assignment by the defendants they were unable to procure the signature of said Johnson. The evidence offered was excluded, and the defendants excepted.

The following facts were found by the court, viz: That on or about the 1st of June, 1856, the defendants, Johnson, Brown & Snow, formed a copartnership under the firm name of Johnson, Brown & Company, and that such copartnership continued until the 21st day of March, 1857. That on the 21st day of March, 1857, the defendants, Brown and Snow, executed to the defendants, Myers & Lowrey, an assignment of all effects and property of the said firm of Johnson, Brown & Company, in trust to pay the debts of the firm, giving preferences as alleged in the complaint. That said assignment was executed without the knowledge, concurrence or assent of the defendant, Wm. H. Johnson. That the defendants, Myers & Lowrey, acting under said assignment, took possession of the property of the said firm of Johnson, Brown & Company, and held the same at the time of the commencement of this suit, and at the time of service upon them of the injunction in this action. That the judgments set forth in the complaint were recovered as therein alleged, and that such of the said judgments as were not recovered by the plaintiff, were sold, set over and assigned to him as alleged in the complaint, and that the amounts of said judgments, with interest thereon, are now due and owing to the plaintiff. That executions upon the said judgments were issued and returned as alleged in the complaint, and that transcripts of said judgments had been first duly filed in the office of the clerk of the city and county of New York, and in the office of the clerk of the county of Kings. That the defendant, Wm. H. Johnson, was a resident of the state of Massachusetts, and not of the state of New York. On the above facts the court decided as matter of law, and adjudged: 1st. That the assignment set forth in and admitted by the pleadings was not valid in law, and was

fraudulent and wholly void. 2d. That said assignment did not pass to the defendants, Myers & Lowrey, any right in or title to any of the property of the said firm of Johnson, Brown & Company. 3d. That the plaintiff was entitled to a priority in the payment of the debts, judgments and indebtedness set forth in the complaint, over and before the other creditors of the firm; and that he had acquired a lien upon the property of the firm for the payment of the said debts and judgments. 4th. That the plaintiff was entitled to the relief demanded in the complaint, and the assignment made by the defendants was ordered to be set aside as fraudulent and void; and a receiver was directed to be appointed. The defendants appealed from this judgment.

L. A. Fuller, for the plaintiff.

C. A. Nichols. for the defendants.

By the Court, INGRAHAM, P. J. That an assignment for the benefit of creditors made by a part of the members of the firm without the consent of the other member, where such partner is present, is invalid, has been settled by repeated adjudications. (*Pettee* v. *Orser*, 6 *Bosw.* 123, *affirmed in Ct. of Appeals, Dec.* 1864. *Robinson* v. *Gregory*, *Ct. Appeals, Dec.* 1863. *Wells* v. *March et al.*, *Id. March*, 1864.) And it is also settled that the mere absence of the partner from the state when the assignment is executed will not make the transaction valid. (*Robinson* v. *Gregory*, *supra.*)

The reason assigned for these decisions is, that such a transaction breaks up the whole business of the firm, and places the property in the hands of the trustees, through the act of a portion of the members of the firm, when all should be consulted and have an opportunity of taking part therein, and in the selection of the trustee.

Even in a case where the transfer was for the purpose of

paying a debt, although a majority of the court sustained the transfer by one partner, it was seriously doubted by two of the judges. (*Mabbett* v. *White*, 2 *Kernan*, 442.)

In the present case, one partner had absconded, and upon the trial the defendants' counsel offered to prove, that prior to making the assignment, Johnson, the partner who did not execute the assignment, "had ceased to act as a member of the firm, and he had absconded, and had made fraudulent conveyances of the copartnership property, &c.; and that before and at the time of making the assignment the other partners used diligent efforts to obtain the concurrence of Johnson, but were unable to effect the same or have any communication with him." This evidence was excluded as immaterial on the objection of the plaintiff's counsel, to which the defendants excepted.

The question raised by this exception is, whether the fact that one of the partners has absconded and ceased to act as a member of the firm, is a sufficient excuse for the execution of an assignment by the other partners, so as to sustain such an instrument as a valid transfer of the property of the firm.

The case of *Wells* v. *March*, in Court of Appeals, March term, 1864, above referred to, is somewhat in point. In that case the assignment was executed by one partner only in his own name, and he signed the name of the firm. It appeared in evidence that the firm was Nace & Coe; that Nace had taken and used the property of the firm and absconded, leaving a letter addressed to Coe, in which, after admitting his conduct, he said: "Take charge of everything in our business—close it up speedily. I assign you my interest in the business of Nace & Coe." This letter and the absconding was held by the court sufficient to authorize the execution of the assignment by the remaining partner, and the judgment in favor of the defendant was affirmed.

When one of a firm absconds, he abandons the business of the firm, and leaves the management of the affairs of the partnership with those who remain behind, and such act

should, in my judgment, be construed as vesting in the other members of the firm full authority to manage and settle up the business.

It is, in fact, an abandonment to them of the entire management and disposition of the property belonging to the firm, and vests in them full authority to do what is necessary to pay the debts and wind up the concern.

The letter, in the case last referred to, was but an expression in writing of what was without it the natural consequence of the absconding partner's acts.

This was held in *Kemp* v. *Carnley*, (3 *Duer*, 1,) and in *Deckard* v. *Case*, (5 *Watts*, 22 ;) *Kelly* v. *Baker*, (2 *Hilton*, 531.) Where one partner dies, the surviving partners have the control and disposition of the property, and may make an assignment of the property of the firm for the benefit of creditors, without consulting the representatives of the deceased partner. (3 *Paige*, 517.) The same rule should be applied to one who abandons the interests of the firm, and absconds, to avoid the creditors, or for any other cause, leaving to his partners the control of the business.

The evidence, I think, was admissible, and the judge erred in excluding it. A new trial should be granted ; costs to abide event.

[New York General Term, February 6, 1865. *Ingraham, Clerke* and *Sutherland*, Justices.]

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MARTIN and others *vs.* O'CONNER.

A covenant on the part of lessees, to pay taxes and assessments, ordinary and extraordinary, is a covenant real, running with the land, and an action can be maintained on it, by the lessor, against an *assignee* of the lessees; but not against an *under tenant* of the lessees, or against an *assignee* of such *under tenant*.

In 1815, M. leased to the M. E. Church, two lots of land for the term of forty years, the lessees covenanting to pay a specified rent, and to pay and discharge the taxes and assessments, ordinary and extraordinary. In April, 1837, the M. E. Church granted and demised the lots to H. for eighteen years, being the residue of their term, H. covenanting, for himself and his assigns, to pay the taxes and assessments. In 1843 H.'s administrator sold and assigned to the defendant the last mentioned lease, to have and to hold the premises for and during the residue of said term of eighteen years therein mentioned, subject to the rents, covenants, &c. therein also mentioned. The plaintiffs succeeded to the title of the original lessor, M., and just before the termination of the original lease, in 1855, were compelled to pay an assessment laid upon the property.

Held that though the lease by the original lessees, to H. was a lease of the whole unexpired term, yet as it contained a covenant on the part of H. to surrender up the possession of the premises to *his* lessors, at the expiration of the term, and also a covenant to pay the rent to his lessors and a provision giving his lessors a right of re-entry in case of non-payment of the rent, or a breach of any of the covenants, the case of *Post* v. *Kearney*, (23 *N. Y. Rep.* 394,) was in point to show that H. was the under tenant, and not the assignee of the original lessees; and that therefore no action could be maintained, either against him or his assignee, on the covenant by the original lessees to pay the taxes and assessments.

ON the 1st of May, 1815, Michael Varian leased to the trustees of the Methodist Episcopal Church two lots in the city of New York, for the term of *forty years*, for the annual rent of one hundred dollars, payable quarterly, the lessees covenanting to pay and discharge all such taxes and assessments, "both ordinary and extraordinary," as shall or may, during the said term hereby granted, be charged, assessed or imposed upon the said demised premises. By indenture, dated April 29, 1837, the Methodist Episcopal Church granted and demised the same property to one Hagadorn, for eighteen years from the 1st of May, 1837, being the residue of their term, for the same rent of one hundred

dollars, payable to them quarterly, and Hagadorn covenanted for himself and assigns to pay and discharge all taxes and assessments, &c., in the same language as that used in the original lease. The church also, by the same indenture, sold to Hagadorn the buildings on the premises, with the same right to remove them at the end of the term that the church had in the lease from Varian. Hagadorn's administrator, by assignment dated May 1, 1843, in consideration of five thousand and fifty dollars, sold and assigned to the defendant the lease last above described, with the buildings and appurtenances, "to have and to hold the same" for and during all the rest, residue and remainder yet to come, of and in the term of eighteen years mentioned in the said indenture of lease, *subject, nevertheless, to the rents, covenants, conditions and provisions therein also mentioned.* The plaintiffs succeeded to the title of the original lessor, Michael Varian, and were obliged to pay and did pay an assessment laid upon the property described, for widening Walker and extending Canal street, confirmed on or about the 1st of April, 1855, just before the termination of the original lease, which expired May 1, 1855. The action was brought to recover the money so paid. The cause was tried without a jury, and the judge dismissed the complaint on the ground that neither Hagadorn nor the defendant was bound to the plaintiffs by the covenant of the original lessees to pay the assessment. The plaintiffs appealed from the judgment entered on this decision.

S. P. Nash, for the appellant. I. By the original lease, the lessees, the trustees of the Methodist Episcopal Church, were bound to pay and discharge the assessment in question. When they demised to Hagadorn, they demised the whole remaining portion of their term, the original lease being for forty years from May 1, 1815, the lease to Hagadorn eighteen years from May 1, 1837. The rent reserved in each case was one hundred dollars. Hagadorn covenanted for himself

and assigns, that he would pay all *assessments*, &c. Hagadorn's administrator assigned this lease and the unexpired term to the defendant, subject to the covenants in the said lease mentioned. Now, whether the sub-lease to Hagadorn was or was not equivalent to an assignment, Hagadorn, by his express covenant with the trustees, was bound to pay the assessment in question. The defendant was undeniably assignee of Hagadorn's term, and bound by his covenant. It is clear, therefore, that as between the plaintiffs, as successors of the original landlord, and the trustees of the church, the trustees were bound to pay the assessment in question; as between the trustees and Hagadorn, Hagadorn was bound to pay it; as between Hagadorn and the defendant, the defendant was bound to pay it. Unless, therefore, there is some rule of procedure which prevents the plaintiffs enforcing this liability directly against the defendant, instead of mediately through the trustees and Hagadorn, the plaintiffs ought to recover. The plaintiffs contend that, under the circumstances of this case, there is no technical rule to prevent such recovery.

I. An action at law will lie on a promise made by a defendant, upon a valid consideration, to a third person, for the benefit of the plaintiffs, though the plaintiffs were not privy to the considertation; as where the defendant, a purchaser from a mortgagor, assumed with him to pay off a mortgage held by the plaintiff. (*Burr* v. *Beers*, 24 *N. Y. Rep.* 178. *Lawrence* v. *Fox*, 20 *id.* 268.) Hagadorn, the lessee in the lease of 1837, was chargeable with notice of the covenants in the lease of 1815, from Varian to the trustees. (*Cosser* v. *Collinge*, 3 *M. & K.* 283.) He made with them the same covenant, as to assuming and paying off taxes and assessments, which they had made with Varian; and this personal engagement of Hagadorn with the trustees enured, therefore, to the benefit of the original landlord, and could have been enforced by him within the cases above cited. 2. Such right of action of the original landlord, Michael

Varian, could not, perhaps, assuming that Hagadorn was a sub-tenant, not an assignee, have been enforced by an assignee of the reversion in his own name, at common law, nor under the statute of 32 *Henry* 8, *chap.* 34. (1 *R. S.* 747, § 234, *marg. pages.* *Van Rensselaer* v. *Read*, 26 *N. Y. Rep.* 558, 579.) But under the code, the common law rule, that an assignee of a chose in action could not sue in his own name, is abrogated, and actions are now prosecuted in the name of the real party in interest. (*Code*, § 111.) Michael Varian's right of action against Hagadorn could, therefore, be prosecuted in the name of the plaintiff, as his successors in the ownership of the reversion. 3. The defendant took, expressly subject to this covenant of Hagadorn, and is liable to the same extent he would have been. He took an assignment of Hagadorn's term; he was not in as under-tenant of Hagadorn, but as assignee. He also, by the terms of the assignment, took, *subject to* Hagadorn's covenants. (*See Halsey* v. *Reed*, 9 *Paige*, 446; *King* v. *Whitely*, 10 *id.* 465; *Trotter* v. *Hughes*, 2 *Kernan*, 74; *Burr* v. *Beers*, 24 *N. Y. Rep.* 178; *Gridley* v. *Gridley*, *Id.* 130, 135–7.) These cases established a rule, that where the owner of property subject to or on which he has created a charge which he is personally liable to pay, conveys it to another who assumes the liability, the latter becomes personally bound to the creditor. Here Hagadorn, the owner of the term subsequently assigned to the defendant, made a covenant which became a charge upon and ran with the land. On this covenant he was personally liable to Michael Varian, the original landlord, and to his assigns; the plaintiff by taking an assignment of the term from Hagadorn, the defendant assumed his covenants and liabilities that ran with the land. (*Jacques* v. *Short*, 20 *Barb.* 269. *Allen* v. *Culver*, 3 *Denio*, 284. *Post* v. *Kearney*, 2 *Comst.* 394.) And the mortgage cases above cited are therefore in point to establish his liabilities.

II. The obstacles at common law to maintaining an action like the present were technical, and do not exist under the

code. 1. At common law the assignee of a right of action not negotiable could not maintain an action except in the name of his assignor. (1 *Chitty's Plead.* 15, 16.) But this rule did not exist in equity. (2 *Story's Eq.* § 1039, 1040, 1041.) The code has abolished the rule of the common law, and adopted that of equity. (§§ 111, 118.) This disposes of the objection that the action could not be maintained except in the name of the original lessor, Michael Varian. 2. The objection that Michael Varian, or his assignees, could not have sued Hagadorn, upon his covenant with the church, to pay the assessment which the church were liable to pay to Varian, is based upon a supposed want of privity of contract. But the modern cases disregard this objection, where the debt or liability which the first promissor has undertaken to pay is the same which the second promissor undertakes with him to pay, so that payment by the latter discharges both obligations. If A is a creditor to B, and C promises B that he will pay the debt, A may sue C directly, though the promise be not made to him. (*The Delaware and Hudson Canal Co.* v. *The Westchester Co. Bank*, 4 *Denio*, 97 ; *and see Peck* v. *Ingersoll*, 3 *Seld.* 528.) And where the assignee or sub-tenant himself covenants absolutely, as here, to perform the covenant of the original lessee, he is directly liable for a default. (*Jackson* v. *Port*, 17 *John.* 479.)

III. But the indenture from the church to Hagadorn, though in the form of a demise, transferred the whole term and left no scintilla of reversionary interest. (*Prescott* v. *De Forest*, 16 *John.* 159.) This case therefore is unlike the following cases, where there was a clear reversionary interest reserved, though the sub-lessee took substantially the whole term. He did not take the whole *estate*. (*Post* v. *Kearney*, 2 *Comst.* 394. 1 *Sand. S. C. R.* 105, *S. C.*) See the case in Sandford, for the terms of the sub-lease. (*Piggot* v. *Mason*, 1 *Paige*, 414. *The People* v. *Robertson*, 39 *Barb.* 9.)

IV. As the defendant was clearly assignee of Hagadorn, and as such liable to the church to pay the assessment in

question, and as the church was as clearly liable to the plaintiffs, the dismissal of the complaint was erroneous, and a new trial should be awarded.

E. N. Taft, for the respondent. The lease of the corporation of the Methodist Episcopal Church to Hagadorn, constituted an under-letting, and not an assignment, of the lease first above-named. (*Post* v. *Kearney*, 2 *Comst.* 394.) This case is exactly in point, and is decisive of the question that an under-tenant is not liable in such a case. (*See McFarlan* v. *Watson*, 3 *Comst.* 287.) An assignee of a lease ceases to be liable after he makes an assignment of the lease, and, therefore, in the case of *Post* v. *Kearney*, if the defendant had established that he had assigned the lease to Shepherd, he would not have been liable. He was held liable on the ground that it was not an assignment, but a sub-letting. (*Childs* v. *Clark*, 3 *Barb. Ch.* 52.) On the argument in the court below, reference was made to the report of the case of *Post* v. *Kearney*, in the superior court, (1 *Sandf. S. Ct. R.* 105,) and from that it was claimed, that the decision in the court of appeals did not turn upon the *reason given in the opinion.* In the opinion given in the superior court, there are four particulars mentioned, upon which the decision is based, to wit: 1st. "It (the lease) reserved to himself the payment of an annual rent four times as great as that reserved in the lease." 2d. "*The possession was to be delivered to him at the end of the term.*" 3d. "In case of the destruction of the buildings by fire, the whole demise to Shepard was to terminate;" and 4th. "Shepard, if he held to the end of the original term, was to have no interest in the payment for the buildings, or in the alternative renewal." Upon which of these the court laid the most stress, and whether or not the court considered any one of them as sufficient by itself to warrant its decision, or whether all were considered to be entitled to equal weight, does not appear.

Certain it is that the court cites the fact "that *the pos-*

session was to be delivered to him" (*Post*) "at the end of the term." And certain it is and significant, that in the statement of the case in the court of appeals, *that fact is italicised*, and that, and the form of the lease, and the reservation of rent to the alleged assignor, are selected by the court as the ground and premise of its conclusion. Surely it can not justly be claimed that the court of appeals did not pass upon the force of the facts mentioned as the ground of their decision; but that their decision should be considered by this court to have been upon some other ground not referred to. What the court of appeals state as the ground of their decision is exactly what exists in the case before the court. Of course we must take the court's own statement of the law of that case. It is as follows: "The lease between the parties last mentioned, is in the usual form, with covenants by the lessee for the payment of rent, and for the *surrender* of the premises, at the close of the term, in good order and condition. Shepard THEREFORE did not hold the premises as assignee, but as the under-tenant of the defendant." The superior court speaks of rent being reserved to Post, and also of its being greater than in the lease claimed to have been assigned. The court of appeals speaks simply of the fact that there was the usual covenant by Shepard for the payment of rent to Post. The essential thing seems to have been the *right of Post to the rent*, and not the *amount of rent, whether more or less.* The superior court mentions the fact, that "in case of the destruction of the buildings by fire, the whole demise to Shepherd was to terminate. The court of appeals does not refer to this. And does this provision retain any estate in Shepherd, or, in other words, if the whole estate of Shepherd would have passed without this provision, would it not with it? The following authorities will show that this provision of itself left no estate or reversion in Post. The estate would have passed, had it not been for other reasons, subject only to be defeated by a condition subsequent. (4 *Kent's Com.* 354 *in margin.*

2 *Preston on Ab.* 88. *Payn* v. *Beal*, 4 *Denio*, 411. *De Peyster* v. *Michael*, 2 *Seld.* 467.) But observe that there is a similar provision in the lease before the court, giving the right to Jacob F. Hagadorn's lessor to re-enter on the non-payment of rent by him. If there is a reversion in the one case, there is in the other. The right to the appraised value of the buildings, unless the lessor should elect to renew the lease, was not an estate, or any part of an estate. This right in Post constituted no part of the term or estate for years created by the lease. There is, I think, every reason to believe, *aside from this statement of the court itself*, that the lease being in the usual form, with covenants by the lessee for the payment of rent, and for the surrender of the premises at the close of the term to Post, formed the essential ground of the decision. But however this may be, that statement found in the opinion of the court must be decisive of the question. And as in the case before the court, the lease to Hagadorn from the lessees in the original lease was in the usual form, with covenants by the lessee for the payment of rent, and for the surrender of the premises at the close of the term, in good order and condition to Hagadorn, it would seem clear that the decision of the court of appeals in *Post* v. *Kearney* must authoritatively determine this case in favor of the defendant and respondent.

By the Court, SUTHERLAND, J. There is no doubt that the covenant on the part of the lessees in Varian's lease, to pay the taxes and assessments, is a covenant real running with the land, and that an action could have been maintained on it by the lessor against an *assignee* of the lessees; but it is equally clear that no action can be maintained on it against an under-tenant of the lessees, or against an assignee of such under-tenant.

Though the lease of the original lessees (the trustees, &c.) to Hagadorn, was a lease of the whole unexpired term, yet, as it contained a covenant on the part of Hagadorn to sur-

render up the possession of the premises to his lessors at the expiration of the term, and also a covenant on his part to pay the rent to his lessors, and as it contained a provision giving his lessors a right of re-entry in case of non-payment of the rent, or of a breach of any of the covenants on his part, I can not see why the case of *Post* v. *Kearney*, (2 *Comst.* 394,) is not in point to show, conclusively, that Hagadorn was the under-tenant, and not the assignee of the original lessees; and that therefore no action could be maintained either against him or his assignee on the covenant by the original lessees to pay the taxes and assessments.

All this I understand to be virtually conceded by the counsel for the appellants; but he makes an ingenious attempt, in his points, to bring another principle to the support of the action, that is, that an action at law will lie on a promise made by a defendant upon a valid consideration, to a third party for the benefit of the plaintiffs, though the plaintiffs were not privy to the consideration; citing *Lawrence* v. *Fox*, (20 *N. Y. Rep.* 268,) and *Burr* v. *Beers*, (24 *id.* 178,) to illustrate the principle. But in view of the express covenant on the part of Hagadorn *with his lessors* (the original lessees) to pay the taxes and assessments, certainly no covenant on the part of Hagadorn *with the original lessor* can be implied; and if Hagadorn made the express covenant as the under-tenant and lessee of the original lessees, and not as their assignee, the covenant must be presumed to have been for the benefit of his immediate lessors, and not for the benefit of the original lessor. To hold otherwise would be inconsistent with the decision in *Post* v. *Kearney*, (*supra*,) making Hagadorn an under-tenant and not an assignee. A covenant by Hagadorn as assignee to pay taxes, &c. might probably have been said to have been for the benefit of the original lessor, but the covenant by him as under-tenant to pay taxes, &c. must be deemed to have been made for the benefit of *his* lessors. The same circumstances, covenants and provisions in the lease to Hagadorn, which, according to the decision

of the court of appeals before referred to, made him an undertenant, and not an assignee, must be deemed to show that his covenant to pay the taxes, &c. was for the benefit of the party with whom it was made.

I think it follows from the decision of the court of appeals in *Post* v. *Kearney*, (*supra*,) that the judgment dismissing the complaint was right, and should be affirmed with costs.

[New York General Term, February 6, 1865. *Ingraham*, *Clerke* and *Sutherland*, Justices.]

JOHN SULLIVAN, Executor, &c. *vs.* CATHARINE MARA and MATTHEW MARA, guardian of William Mara.

A testator, by the first clause of his will, gave and bequeathed to his wife, C., one-third of all the property possessed by him at the time of his death, and he gave and bequeathed the remaining two-thirds to his son W. By the second clause of the will the executors were authorized to sell and convey, in fee simple, all, or any part of the real estate, and to rent or lease any part of it, until so disposed of. The testator then declared it to be his intention to give his executors "the general superintendence and control over his real and personal estate, to manage the same in such manner as they in their discretion shall think best for the interest of my wife and child, the net income arising therefrom to be divided between my said wife and child, in manner before stated." By the third clause, the testator declared that if his son should not attain the age of twenty-one years, then he gave and bequeathed the interest of his son to E. M. for her own use and benefit forever. By the fourth clause, the testator appointed M. M. guardian of his son, W., and directed that W. should be suitably provided for and liberally educated, and morally and religiously instructed, and that all money not necessary for that purpose be deposited in a savings bank, or invested on bond and mortgage, &c.

Held that the dispositions of the testator's property intended by his will could not be carried out, consistently with allowing the claim of his widow, C. for dower, in addition to the provisions made for her by the will; and that consequently she was put to her election.

CASE agreed upon and submitted under sec. 372 of the code of procedure. John Mara, the testator, late of the city and county of New York, having made his last will and

testament, died on the 28th day of March, 1858, leaving Catharine Mara, his widow, and his only child a boy, now about eleven years of age, residing with his mother. The said will contained these provisions:

"*First.* After all my lawful debts are paid and discharged, I give and bequeath to my wife, Catharine Mara, one-third of all the property possessed by me at the time of my death, and I give and bequeath to my son, William Mara, the remaining two-thirds of the property possessed by me at the time of my death.

Secondly. I hereby fully authorize and empower my executors hereinafter named, and the survivor of them, at any time after my decease, and whenever they shall think proper, either at public auction or private sale, to grant, bargain, sell and dispose of all or any part of my real estate, and to execute and deliver to the purchaser or purchasers thereof good and sufficient deeds of conveyance in law in fee simple for the same; and I do also fully authorize and empower my said executors and survivor of them to rent and lease all or any of my real estate from time to time, until disposed of as aforesaid, it being my intention to give my said executors the general superintendence and control over my real and personal estate, to manage the same in such manner as they in their discretion shall think best for the interest of my wife and child, the net income arising therefrom to be divided between my said wife and child in manner before stated.

Thirdly. If my said son should not attain the age of twenty-one years, then I give and bequeath the interest of my said son to my mother Ellen Mara, for her own use and benefit forever.

Fourthly. I do hereby nominate, constitute and appoint my brother, Matthew Mara, to be guardian of the person and estate of my said son, William Mara, and direct that my said son be suitably provided for and be liberally educated and morally and religiously instructed, and all the money over and above the sum necessary for said purposes to

be deposited in one or more of the savings banks in the city of New York, or invested on bond and mortgage on property worth double the sum loaned or invested. Likewise I make, constitute and appoint my brother, Matthew Mara, of the city of New York, and John Sullivan, of said city, to be the executors of this my last will and testament, hereby revoking all former wills by me made."

The will was admitted to probate, and John Sullivan, qualified as executor, and Matthew Mara qualified only as guardian of William Mara, under said will. The plaintiff claimed as follows: That the defendant, Catharine Mara, is only entitled under said will to one-third of the net income of the said estate of the said John Mara, deceased, for her life, exclusive of dower, and that the apparent intent of the will was to give her but one-third of the net income and two-thirds to the child, and to exclude dower; and that it was the clear and manifest intention of the testator to give her but one-third, (and not dower in addition to one-third,) and such intention will be fairly deduced from the scope and tenor of the will. The defendant, Matthew Mara, concurs in the claim of the defendant, Catharine Mara. The defendant, Catharine Mara, claims: That by said will she is a legatee and devisee entitled to an estate in fee to one-third of the estate of John Mara, deceased, and as his widow, she is also entitled to dower in and to the estate of her said late husband, and that the same should be allowed her by the plaintiff and the defendant Matthew Mara. The parties agreed upon the foregoing case and submitted the same to the court, to determine the following questions:

First. Whether the defendant, Catharine Mara, is entitled to dower in the estate of her late husband in addition to the provision for her in his will.

Second. Whether the provision for Catharine Mara, under said will, gives her a life estate only, or an estate in fee to one-third of the estate of her said late husband in addi-

tion to dower, or what estate or interest she acquires by the said will.

C. K. Smith, for the plaintiff.

Wm. C. Traphagen, for the defendant Catharine Mara.

By the Court, SUTHERLAND, J. It appears to me plain that the dispositions of the testator's property intended by his will can not be carried out consistently with allowing the claim of his widow, Catharine Mara, for dower, in addition to the provisions made for her by the will.

The first article of the will contains an absolute gift and bequest to the testator's wife, Catharine Mara, "of one-third of all the property *possessed*" by the testator at the time of his death, and an absolute gift and bequest of the other two-thirds, to the testator's son William Mara. By the second article of the will, the executors are authorized to sell and convey in fee simple, all, or any part of the testator's real estate, and to rent and lease all or any part of it, until disposed of as aforesaid; and the testator then, by this article, declares it to be his intention to give his executors "the general superintendence and control over his real and personal estate, to manage the same in such manner as they in their discretion shall think best for the interest of my wife and child, *the net income arising therefrom to be divided between my wife and child*, in manner before stated."

By the third article, the testator declares, if his son should not attain the age of twenty-one years, then he gives and bequeaths the interest of his son to the testator's mother, Ellen Mara, for her own use and benefit forever.

By the fourth article, he appoints his brother Mathew Mara guardian of his son, and directs that his son be suitably provided for and be liberally educated, and morally and religiously instructed; and that all money not necessary for that purpose be deposited in one or more of the savings

banks in the city of New York, or invested on bond and mortgage, on property worth double the sum loaned or invested.

After the making of his will, the testator died, in 1858, seised and possessed of three or four lots of land, and a small personal property, both then not exceeding in value $10,000, leaving Catharine Mara, his widow, and an only child, a boy, William Mara, now about eleven years of age.

It does not appear from the case agreed upon and submitted, that Catharine Mara, the widow, claims dower in any lands except such as the testator died seised and possessed of.

The testator evidently intended that his widow should have, under or by his will, the benefit of one-third of *all* his estate *real* and personal after the payment of his debts, absolutely and forever. He probably intended, that she should have only one-third of the income until his son became of age, or until his death, if he died sooner.

It is evident, too, that the testator intended that his son, if he lived to the age of twenty-one, should have the benefit of the remaining two-thirds of all his estate real and personal, absolutely and forever; and until he became twenty-one, or his death before twenty-one, that so much of two-thirds of the income as was necessary for such purpose should be used for his maintenance and education, and the remainder be invested for his benefit.

The testator expressly declares, if his son should not attain the age of twenty-one, that then the testator's mother should take the interest of his son, for her use and benefit forever.

Now, it is certainly plain, that in not one of these particulars can the testator's testamentary intention be carried out, if the widow is allowed dower, in addition to the provisions made for her by the will.

In the first place, if one third of the real estate is set off to her for dower, she can not take, *under the will*, the one-

third of the net income of *all* the testator's real and personal estate until the son becomes twenty-one, or his death sooner; nor one-third of *all* the estate *real* and personal, absolutely and in possession, on the son becoming twenty-one, or dying sooner.

In the next place, if one-third of the real estate is set off for her dower, the executors can not exercise the discretionary power given them, to sell or lease *all* or *any* of the real estate.

In the next place, if one-third of the real estate is set off for her dower, two-thirds of the income of the *whole* estate, in her life time, can not be used and invested for the benefit of the son, as directed by the will; nor, if he should attain the age of twenty-one, before the death of his mother, could he take absolutely and forever two-thirds of *all* the estate, or the proceeds thereof; nor, in case of his death before twenty-one, living his mother, could the testator's mother take the son's testamentary interest in the *whole* estate.

Now there is not much satisfaction in looking at cases on this question. It is difficult to gather from them any definite, practical, useful rule, but I think the following cases will sufficiently show that the widow in this case was put to her election: *Dodge* v. *Dodge*, 31 *Barb.* 413; *Chalmers* v. *Storil*, 2 *Ves. & Beames*, 222; *Parker* v. *Somerby*, 27 *Eng. Law and Eq.* 154; *Herbert and others* v. *Wren and others*, 7 *Cranch*, 370-378.

There should be judgment in accordance with the views above expressed.

New York General Term, February 6, 1865. *Ingraham, Clerke* and *Sutherland*, Justices.]

DOTY *vs.* MILLER.

A broker or agent who undertakes to sell property for another for a certain commission, when he finds a purchaser willing to purchase at the price, has earned and can recover his commission, though the sale was never completed, if the failure to complete the same was in consequence of a defect of title, and without any fault of the broker or agent.

RICHARD SALTONSTALL, the assignor of the plaintiff, was employed by the defendant, through an agent, as broker, to negotiate the sale of a mortgage for $5,000, represented to be a "1st mortgage." It was agreed that he was to receive $200, and the interest on the mortgage from 1st May to 11th June, this sum to cover his brokerage and all the expenses of searching the title, &c. The arrangement was afterwards fully ratified by the defendant himself. Saltonstall did negotiate a sale of the mortgage early in June to a Mr. Hitchcock, who was to pay the face of it, and search the title free of expense. Hitchcock testified that he agreed to purchase the mortgage and was prepared to pay the money and complete the transaction, but did not complete it. The plaintiff offered to prove by Hitchcock that his refusal was caused by the fact that, on examining the title, he found it defective, and found prior incumbrances on the property, but the evidence was excluded and an exception taken. The court nonsuited the plaintiff, on the ground that no commission was earned if the sale was not consummated, and the plaintiff excepted and appealed from the judgment.

Henry Whittaker, for the appellant.

John K. Hackett, for the respondent.

By the Court, SUTHERLAND, J. It would seem to follow from the decision of this court, in *Glentworth* v. *Luther*, (21 *Barb.* 145,) and of the common pleas in *Holly* v. *Gos-*

ling, (3 *E. D. Smith*, 262,) that the offer to prove that Hitchcock did not complete the purchase, in consequence of there being prior incumbrances, and of a defect in the title, was improperly overruled. These cases are to the effect that a broker or agent who undertakes to sell property for another for a certain commission, if he finds a purchaser willing to purchase at the price, has earned and can recover his commission, though the sale never was completed, if the failure to complete the sale was in consequence of a defect of title, and without any fault of the broker or agent.

The evidence offered, then, in this case should have been received, for it went to show that it was not the fault of the plaintiff's assignor that the sale was not completed.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

[New York General Term, February 6, 1865. *Ingraham, Clerke* and *Sutherland*, Justices.]

James, Executor, &c. *vs.* Taylor.

Under the married woman's acts, of 1848 and 1849, a married woman has capacity, notwithstanding her coverture and irrespective of the act of 1860 authorizing a feme covert to carry on a trade or business and protecting her earnings, to purchase a stock in trade, business and good will, by executing a mortgage on her own separate real estate, and to recover for work, labor and services done and performed, and materials furnished by her in the course of such business.

APPEAL from a judgment entered upon the report of a referee. The action was brought by the plaintiff, as executor of Sarah B. James, deceased, to recover for work, labor and services done and performed, and materials furnished by the plaintiff's testator. The referee reported in favor of the defendant, and the plaintiff appealed.

S. V. R. Cooper, for the appellant.

C. Van Santvoord, for the respondent.

By the Court, SUTHERLAND, J. I think the conclusion of law of the referee, that Mrs. James (the plaintiff's testatrix) had no title to the demand in suit, and that it did not pass to the plaintiff as the executor of her will, was erroneous, and not authorized by the facts found by the referee. I think, on the facts found by the referee, the plaintiff was entitled to judgment. The referee found as facts, that in 1855, Mrs. James bought out one George Walker, who carried on the furnace heating and ventilating business, at No. 77 White street, in the city of New York, and that thenceforth she carried on the same business, first at the same place and afterwards at 83 White street; that the business was carried on in her name, though mostly managed by her husband as her agent; that she made the purchase from Walker by executing a mortgage on her own separate real estate, which she had acquired since 1849, by gift or purchase, from persons other than her husband; and that the demand in suit was for work, labor and services done and performed, and materials furnished in the course of the business so carried on by Mrs. James, in and about certain alterations of the smoke pipe of a furnace in the defendant's house, and in and about certain other alterations in flues in the wall over the furnace, intended to improve the operation of the furnace.

Now, I think these facts would have authorized a judgment for the plaintiff irrespective of the act of 1860, authorizing a married woman to carry on a trade or business, and protecting her earnings therefrom. Under the married woman's acts of 1848 and 1849, she had capacity, notwithstanding her coverture, to acquire, by gift or grant from any person other than her husband, and to dispose of by will, any property, real or personal. The capacity to acquire by

grant implies the capacity to acquire by purchase. The referee finds that she did purchase out Walker's stock in trade, business and good will by giving a mortgage on her separate real estate, acquired by her by gift or purchase from persons other than her husband after 1849. If Walker was willing to take the mortgage instead of cash, as to the defendant certainly, a debtor of her's and not a creditor of her husband, the case stands precisely as if she had paid Walker in gold. It is true, the referee also finds that the mortgage was paid out of the proceeds of the business, but I can not see what difference this makes. She bought out Walker on the credit of her separate real estate. It may really be said she bought out Walker with her separate property.

The recent decision of the court of appeals in *Knapp* v. *Smith et al.* (not yet reported, but Judge Denio's opinion in which was handed up on the argument) would appear to be decisive of all the questions in this case.

The judgment should be reversed, and a new trial ordered, with costs to abide the event of the action.

[New York General Term, February 6, 1865. *Ingraham*, *Clerke* and *Sutherland*, Justices.]

George H. McIntyre, Administrator, &c. *vs.* The New York Central Rail Road Company.

43 532
66 57
49b 538
80a 417

Where a passenger upon a rail road, a female, being ordered by an officer of the train, while the cars were in motion, in a dark and rainy night, to pass forward, in attempting to step from one car into another, fell between the cars and was instantly killed; *Held*, in an action brought by her administrator to recover damages of the railroad company, for her death, that the deceased was not so clearly guilty of negligence as to warrant the taking of the case from the jury, on that ground.

Held, also, that the evidence was sufficient to take the case to the jury upon the question whether the death of the intestate was caused by the defendant's negligence.

Where, in such an action, there is proof showing that the services of the deceased might have been of some value to her next of kin, a nonsuit should not be directed.

As the statute gives a right of action in such a case, nominal damages, at least, should be given, if such right is established at the trial.

Where it is apparent from the whole case that the plaintiff can in no event recover any thing but nominal damages, a new trial should not be granted, on his application.

In an action by the personal representative of a person killed by the negligence of the defendant, the jury is not limited to mere nominal damages. The value of the services of the deceased, to her next of kin, is a question for the jury to determine.

THIS was an action under the statute (*Laws of* 1847, *p.* 575, *ch.* 450,) to recover for the death of Mrs. Knight, the plaintiff's intestate, occasioned by the negligence of the defendant's employees, upon its cars, in November, 1859. The facts of the case are substantially as follows: On the 14th of November, 1859, Mrs. Knight, in company with her father, started from Rutland, Vermont, on their way west. They took the defendant's cars at Schenectady, and proceeded safely until they reached Syracuse. At Syracuse, the car in which they were seated was detached from the train, and they were ordered forward into the next car. They had just time to get into the next car forward when the train started. The car which they entered was very full, and they could find no seats. After the cars started, an officer of the train, probably a brakeman, came in and ordered the standing passengers to pass forward, saying that there were plenty of seats forward. Mrs. Knight, her father, and others followed him, and, in passing from the platform of one car to the platform of another, Mrs. K. fell between the cars and was instantly killed. It was dark, and had been raining and freezing; the train had been moving so long, at the time the order was given to go forward, that it was then in very rapid motion. The deceased was about 45 48 years of age, a widow, and had three children living. She was a seamstress, and earned some money over and above her maintenance. The children

of Mrs. Knight are all grown up. At the close of the plaintiff's case, the defendant made a motion for a nonsuit, upon the grounds:

1st. That the plaintiff's intestate was guilty of negligence.

2d. The plaintiff had failed to show pecuniary damage to the next of kin.

3d. The plaintiff had failed to show any negligence on the part of the defendant.

The motion was granted, and the judge refused to submit the case to the jury. To this the plaintiff excepted, and the exceptions were ordered to be heard at the general term, in the first instance.

W. F. Cogswell, for the plaintiff. I. It was negligence in the defendant to start an over loaded car from their depot at Syracuse without proper accommodation for their passengers, or giving the passengers an opportunity to seek such accommodations in other cars of the train, without passing from one to another while the train was in motion.

II. It was gross negligence in the officers of the defendant to direct the passengers in the cars to pass from one car to another in a dark and rainy night, when the cars were in full motion.

III. The plaintiff should not have been nonsuited upon the ground that the plaintiff had failed to show pecuniary damage to the next of kin. Some damage had been shown; and if there had not been, it did not furnish ground for a nonsuit. (*Quin* v. *Moore*, 15 *N. Y. Rep.* 432. *Oldfield* v. *The N. Y. and Harlem R. R. Co.*, 14 *id.* 310.)

IV. The plaintiff should not have been nonsuited upon the ground that she was guilty of negligence in obeying the commands of an officer of the train. She had a right to rely upon his superior knowledge as to the safety in passing from one car to another, and to act accordingly. It was part of his business to direct, as it was her duty to obey. (*Drew* v.

The Sixth Avenue R. R. Co., 26 *N. Y. Rep.* 49. 41 *Barb.* 366. *See also cases cited under next point.*)

V. The defendant having failed to furnish sufficient accommodations in the car which the plaintiff's intestate was directed to enter, or afford an opportunity to her to seek accommodation in other cars of the train before the same were in motion, is liable. Under the circumstances she might lawfully go upon the platform of the car, in passing to the other cars in search of that accommodation which the defendant was bound to furnish. (*Laws of* 1850, *p.* 234, § 46. *Colgrove* v. *The Hudson R. R. Co.*, 6 *Duer*, 382; *charge of Judge Slosson, pp.* 390–2, *inclusive; Opin. of Ct. p.* 414. *Carroll* v. *The New York and New Haven R. R. Co.*, 1 *Duer*, 571. *Willis* v. *The Long Island R. R. Co.*, 32 *Barb.* 398; *Opin. of Judge Emott*, 405. 24 *N. Y. Rep.* 410.)

T. R. Strong, for the defendant. I. The death of the intestate of the plaintiff resulted from her negligence; wherefore the action can not be maintained. When the train of cars started west from Syracuse, the intestate was in the rear car. Soon after, incumbered with a satchel, a basket, with a pot of plants, and the care of an aged infirm man, she went forward, passed through that car, and then to the next car; then through that, and attempted to pass from the latter into the third car forward from the rear, the train being then in rapid motion, and the platform slippery, when she fell and was killed. (*Wilds* v. *The Hudson River R. R. Co.*, 24 *N. Y. R.* 431. *Steves* v. *The Oswego and Syracuse R. R. Co.*, 18 *id.* 422, 427.)

II. The intestate was none the less negligent, because the brakeman requested or directed passengers not having seats to go into the forward cars to obtain them. Assuming that the defendant was negligent, by reason of this request or direction of the brakeman, in that view the case was one of concurring negligence of the intestate and the defendant, which is fatal to the action. The intestate was not required

to comply with such request or direction, and it was negligence for her to do so.

III. There was no negligence by the defendant which contributed to produce the death of the intestate. 1. The omission to furnish seats in the two rear cars was not such negligence. 2. The defendant is not chargeable with negligence from the request or direction aforesaid of the brakeman. Compliance by the intestate was not compulsory, but voluntary, and at her sole peril.

IV. It does not appear that any pecuniary damage has been sustained by the next of kin of the intestate by reason of her death. Her three children were grown up, living independent of her, supporting themselves ; and she made her home with her friends, for whom she worked, spending some portion of the time each year with her married daughter. She had no means, at her death, beyond such interest as she might have had in her husband's estate, which proves that she had not acquired any property for the seven years between her husband's and her own death, her husband having died in 1852, and she in 1857. She was at her death about 48 years of age. It does not appear that any of her children had received any pecuniary benefit from her for several years, or that any could be anticipated in future. (*Laws* 1847, *p.* 575, § 1. *Id.* 1849, *p.* 388, § 1. 3 *R. S. 5th ed.* 589, §§ 3, 4. *Dickins* v. *The N. Y. Central R. R. Co.*, 23 *N. Y. Rep.* 158. *Tilly, adm'r*, v. *The Hudson River R. R. Co.*, 24 *id.* 471.)

By the Court, E. Darwin Smith, J. The nonsuit was granted in this action upon one or more of three grounds, but upon which one, the case does not state. I shall therefore consider them in the order which they occur. The first ground is that the "plaintiff's intestate was guilty of negligence."

I do not think that she was so clearly guilty of negligence as to warrant the taking of the case from the jury on this ground. She was ordered, as several witnesses testify, by

one of the officers or persons in charge of the train, who spoke in a very authoritative manner, to leave the car in which she was standing, and proceed to the forward car. No seat had been furnished her in the car where she then was, and it could hardly be expected that she should remain standing during the journey. Being a woman, and traveling with a very old man as an escort, she would naturally obey the commands of a person belonging to the road, and could hardly be called negligent in so doing.

There was evidence I think sufficient to take the case to the jury, upon the question whether the death of the intestate was caused by the defendants' negligence. The defendant was clearly responsible for the acts of the person in charge of the train, by whose direction the intestate attempted to pass from one car to another. The nonsuit I presume was granted upon the remaining ground, that the plaintiff failed to show pecuniary damages to the next of kin. There is some proof on this point, showing that the services of the decedent might have been of some value; certainly as much as there was in the case of *Oldfield* v. *New York and Harlem R. R. Co.*, (14 *N. Y. Rep.* 310,) where the deceased was a child of six or seven years of age, whose services could have been of but small pecuniary value to her parents. But the court of appeals have decided this question in the above cited case, where Judge Wright, (*p.* 314,) amongst other things, says that "nominal damages, at least, were recoverable;" and Judge Comstock in the same case, at (*p.* 230,) says, "that without any special proof of pecuniary loss, nominal damages at least could be recovered." In the the case of *Quin, adm'r*, v. *Moore*, (15 *N. Y. Rep.*) Judge Comstock, in a case arising under the same statute, says, (*p.* 434:) "It may be added that, as the statute expressly gives the right of action, nominal damages, at least, could be recovered." It is quite clear that if a right of action was established at the time, nominal damages at least should have

been given. So far, therefore, as this question is concerned, the nonsuit was erroneously granted.

But it is argued that this court will not grant a new trial when the plaintiff is only entitled to recover nominal damages. (*Hopkins* v. *Grinnell*, 28 *Barb.* 536. *John. Cas.* 267. 2 *Cowen*, 479.) The cases in which this rule has been so stated put the refusal to grant a new trial upon the express ground that the plaintiff could in no event recover any thing but nominal damages. Some cases assert that this rule can not be applied when the question is presented upon exceptions, or upon error in a superior court of review. In *Herrick* v. *Stover*, (5 *Wend.* 584,) Judge Marcy said, he had always supposed that the party who had been affected by an error, be the extent of the injury ever so small, "can require of us, *ex debito justitiæ* to correct it." The question is presented in this case upon exceptions. The plaintiff's counsel asked to go to the jury, and the judge refused to submit the case to the jury, and the plaintiff's counsel duly excepted.

I think the rule was correctly stated in the opinion of my brother Welles, in *Hopkins* v. *Grinnell*, when he asserts the rule to be, that where it is apparent from the whole case that the plaintiff can in no event recover any thing but nominal damages, a new trial should not be granted. But in this case the jury would not, I think, have been limited to mere nominal damages. If they had given damages for an amount sufficient to entitle the plaintiff to recover full costs or a larger amount, within reasonable limits, the court, I think, would not have set aside the verdict. The deceased was a woman from forty-five to fifty years of age. She had three grown up children, and her life obviously could not have been in a pecuniary sense very valuable to her children, all of whom were settled in life and capable of supporting themselves. She probably could have done little more for the residue of her life than support herself by her personal efforts and industry; but this was a question for the jury.

She was killed near Syracuse in this state, and her home

was with her daughter in Springfield, Pennsylvania. If the jury had found a verdict, as I think they might have done, for an amount that would have indemnified her children for the expenses attending the preserving and removal of her remains to her former home, and her burial and incidental expenses, I think we could not have set it aside. At least I do not think we can say, as matter of law, that a jury may not give over six cents damages in the case, which is what is meant by nominal damages. I can not see, in such case, upon what principle any considerable amount of damages could be given; but it is perhaps hardly in order to discuss that question now, if we hold, as I think we must, that the jury is not limited in such a case to mere nominal damages. I think there should be a new trial; all costs to abide the event.

New trial granted.

[Monroe General Term, March 7, 1865. *Welles, James C. Smith* and *E. Darwin Smith*, Justices.]

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THE PEOPLE, *ex rel.* Jefferson T. Raplee, *vs.* LEANDER REDDY and others, Assessors of the town of Milo, in the county of Yates.

The relator, being assessed for $3000 upon his banking house, $25,000 upon his capital stock, and $28,000 for personal property, including surplus earnings, less the value of his banking house, appealed from the assessment, and testified before the assessors that he had no personal property liable to taxation, except the capital stock of his bank, amounting to $25,000; that $10,000 of that amount was invested in United States six per cent bonds; and that his banking house formed a part of the capital of his bank. *Held* that it was the duty of the assessors, upon these facts, to amend their assessment roll by striking out $10,000 for the amount of the government securities, not taxable, forming a part of the capital of his bank.

Held, also, that as they had assessed his banking house as real estate, the amount of its valuation should also have been stricken out from the amount of the capital stock of his bank.

And that the whole amonnt assessed for personal estate, $25,000, should also have been stricken out; it being the duty of the assessors to take the relator's statement under oath, upon that point, as true.

The provision, in the act of 1851, amending the statute relating to assessments and the collection of taxes, taking away the conclusiveness of the affidavit before required, and making it the duty of the assessors upon an application being made to reduce the value of real and personal estate, to examine the applicant under oath touching the value of his property, and then to fix the value thereof as shall be just, does not give the assessors any right to fix such value arbitrarily or capriciously.

They act judicially, in fixing such value, and are called upon to pass upon the evidence produced before them; and when they have no ground in such evidence, to fix a valuation different from that sworn to by the applicant for a reduction, they are bound to take and follow his statement under oath, as formerly.

Where assessors, in their return to a certiorari, state that they have delivered the assessment roll, duly certified, to the supervisor of the town, and that the same is not in their possession or control, the court has no power to render any judgment that can affect the assessment roll, or correct any errors; although it is satisfied there was clear error in the proceedings.

The only remedy of the person aggrieved, under such circumstances, *it seems*, is by an action against the county, to recover back the amount of the tax improperly assessed and levied.

CERTIORARI to remove proceedings in relation to an assessment upon the real and personal property of the relator; the particular error alleged in the writ being the refusal of the assessor to reduce the assessment down to $15,000. The assessors alleged in their return that they were duly elected assessors of the town of Milo, in the county of Yates, for the year 1864, and qualified as such. That before proceeding to make the assessment in said town, they divided the town into three assessment districts, assigning one of said districts to each. That the district in which Raplee, the relator, resided at the time, was assigned to Leander Reddy, one of their number, to call upon the inhabitants of said district, and inquire of each in relation to the property owned by them respectively, liable to be assessed. That in discharge of said duty, Reddy called upon the said Raplee, at his place of business in said town, and inquired of him what personal and real property he had liable to be assessed,

whereupon said Raplee informed said Reddy, that the capital stock of his bank was twenty-five thousand dollars. That twenty thousand dollars of that was invested in government, or United States bonds, which was exempt from taxation; and that the residue was invested in real estate; the same being his banking house, in Penn Yan. Whereupon they, the said assessors, assessed the said Jefferson T. Raplee, upon the roll, made by them as such assessors, as follows:

Raplee, Jefferson, to banking house and lot, .		$3,000
Upon a valuation, equal to amount of capital stock paid or secured, ...		25,000
Personal property, including the surplus earnings of bank, ...	$28,000	
Less banking house, ...	3,000	
		25,000

That after completing said assessment roll so made by them, they duly gave notice of the time and place when and where they would meet to hear appeals from said assessments, so made by them. That in pursuance of said notice, they met on the 16th day of August, 1864, at the place mentioned in said notice, for the purpose of hearing appeals. The said Jefferson T. Raplee then and there appeared before them in person, and by attorney, stating that he appealed from said assessment, whereupon the said Raplee was duly sworn and testified as follows:

"I have no personal property liable to taxation, except the capital stock of J. T. Raplee's bank, amounting to $25,000. I claim exemption on $10,000 of that, on the following ground: That the amount of said capital is lodged United States with the banking department, as security, in six per cent bonds, of 1881. I claim also an exemption on the banking house, which forms a part of the capital of the bank, assessed at $3,000. There are no surplus earnings of the bank. The bank has earned something during the last year."

That the said Raplee, upon his examination, was asked the following question by the chairman: Question. "What amount has the bank earned during the last year?" To which question said Raplee replied, that had nothing to do with the question, and declined to answer. On the question being repeated by the chairman several times, and no answer being given, it was remarked by one of the other assessors that it was not necessary further to press said question, whereupon said Raplee remarked that he would answer the question if the board of assessors decided that he must. The question was then dropped and nothing further said upon the subject, and no answer was given to the question. That afterwards, upon consultation, a motion was made to reduce the assessment of the said Raplee, on his personal property, ten thousand dollars, which was objected to by the chairman. The motion was carried and the assessment of said Raplee for personal property was reduced by them from twenty-five thousand dollars to fifteen thousand dollars. That after correcting the assessment roll the assessors duly made and verified their certificate on said roll, and delivered the said roll, with the certificate thereon, to John T. Sheetz, supervisor of the town of Milo. That said roll is not now in the possession or under the control of the assessors, and has not been in their possession or control since the coming to them of the writ of certiorari. And that they had no control over said roll, or power or authority to correct the same in any way or manner.

S. H. Wells, for the relator.

D. B. Prosser, for the respondents.

By the Court, E. Darwin Smith, J. The return to the writ of certiorari in this matter presents a clear case of error in the final determination of the assessors. They state that

in their primary assessment roll they assessed the relator as follows:

For banking house and lot, ...		$3,000
Upon a valuation equal to the amount of capital stock paid in or secured, ...		25,000
Personal property including surplus earnings of bank, ...	28,000	
Less, banking house, ...	3,000	
		25,000

That after completing the said roll they gave the notice required by the statute fixing a time when they should meet and hear appeals from said assessment, and that on the day so fixed the relator appeared and stated that he appealed from said assessment; and he made oath and testified before the said board of assessors that he had no personal property liable to taxation, except the capital stock of his bank, amounting to $25,000. That $10,000 of that amount was invested in United States six per cent bonds; and that his banking house, assessed at $3,000, formed a part of the capital of his bank. He was asked some questions by the board, but in no respect varied his statement in regard to his property, or furnished or gave any evidence showing or tending to show that he had any other property liable to taxation.

Upon this statement it was the clear duty of the assessors to have amended their assessment roll by striking out $10,000 for the amount of the government securities not taxable, forming part of the capital of his bank; and as they had assessed his banking house as real estate, the amount of its valuation should also have been stricken out from the amount of the capital stock of his bank; and the whole amount assessed for personal estate of $25,000 should also have been stricken out. He testified that he had no personal property liable to taxation except the capital stock of his bank; and the board of assessors, I think, were bound to take his statement under oath on that point.

Under the assessment law, as it stood under the revised statutes and before the amendment of 1851, the assessors were bound to correct their assessment roll before appeal by any person assessed, in accordance with his affidavit made and produced to them in conformity with the statute. (*Livingston* v. *Hollenbeck*, 4 *Barb.* 9. *The People* v. *The Supervisors of Westchester Co.*, 15 *id.* 615.) The act of 1851, amending the statute relating to assessments and the collection of taxes, (*see Session Laws of* 1851, *ch* 176, *p.* 334,) takes away the conclusiveness of the affidavit before required, and makes it the duty of the assessors, when an application is made by any person, to reduce the value of his real and personal estate, to examine such person under oath touching the value of his property, and after such examination they shall fix the value thereof as they may deem just. This provision does not give the assessors any right to fix such value arbitrarity or capriciously. They act judicially in fixing such value, and are called upon to pass upon the evidence produced before them; and when they have no ground in such evidence to fix a valuation different from that sworn to by the person applying for such reduction, they are bound, I think, to take and follow his statement under oath, as much so as the assessors were formerly required to fix such value at the sum specified in the affidavit required in such cases by the 15th section of article 2d, chapter 13 of part first of the revised statutes.

The object of this amendment was to allow the assessors to examine the person appealing from their assessments, and to subject such person to an oral examination in respect to his property, such as the assessors might think proper to make. But the assessors must act upon the evidence before them like all other officers acting in a judicial capacity, and fix the valuation at a just sum, such as will be warranted by the evidence.

In this case I think it is very clear that there was nothing in the evidence before the assessors to warrant them in re-

taining the assessment of the personal property of the relator at $25,000, besides the other errors above specified.

The only difficulty I have in the case is upon the question whether we can give any appropriate relief to the relator in this proceeding. The certiorari was directed to the assessors, and was a proper writ to bring the erroneous determination of the assessors before us for reversal or correction. If it had issued while the roll was in the hands of the assessors, it would have arrested it in their hands and stayed all proceedings upon it. But they return that after correcting said roll as stated, they duly made and verified their certificate on said roll, and delivered the same with the certificate therein to the supervisor of said town of Milo, and that the said roll is not in their possession, and has not been in their possession or control since the coming to them of the said writ of certiorari.

The writ of certiorari brings up, or is always supposed to bring up, the record of the inferior tribunal to which it is addressed. The judgment to be rendered in this court in such cases is to affirm or reverse, modify or correct the record. It is a judgment upon the record, and if the record were before us we might direct our clerk to correct the roll or send it back to the assessors for correction. When it appeared upon this return that the roll had been delivered to the supervisor, we could have directed a writ of certiorari to him, or to the board of supervisors if the roll had been delivered to such board, to bring the same before us. The writ would reach the record and bring it up wherever it might be, until it had passed beyond our power to review the assessment by its delivery to the collector with the warrant of the board of supervisors annexed after the extension of the tax for its collection.

Although the assessors have made returns to the writ, stating in full their proceedings as a board of assessors, and we are satisfied that there was clear error in such proceedings,

I think we can render no judgment that can now affect the assessment roll, or correct such errors. (*The People* v. *The Supervisors of Allegany*, 15 *Wend.* 198. *The People* v. *The Mayor of N. Y.*, 2 *Hill*, 9. *The People* v. *The Supervisors of Queens Co.*, 1 *Hill*, 195.)

The relator has, I think, now no remedy except by action against the county for the amount of the tax improperly assessed and levied.

I think we can render no judgment on this writ, but must dismiss or quash the same.

Ordered accordingly.

[Monroe General Term, March 7, 1865. *James C. Smith*, *Johnson* and *E. Darwin Smith*, Justices.]

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Otis *vs.* Patrick Cusack and James Cusack.

A parol partition between tenants in common, accompanied by actual possession in accordance therewith, will bind the parties and those claiming through or from them.

And where, after such a partition has been made, the parties take separate possession of their respective portions, and one of them contracts with a mechanic to erect a dwelling house on his part, which is built, accordingly, the interest of the party so contracting is of such a nature as to make it the subject of a lien under the mechanics' lien law, although the title to the whole lot is in the co-tenant.

But the co-tenant, who is not a party to the contract with the mechanic, and who has no interest in the work done, is not liable under the contract; nor is his share of the property subject to the builder's lien.

THIS is an appeal from a judgment entered upon the report of a referee in favor of the plaintiff, against the defendants. The action was instituted to enforce a mechanic's lien, for labor performed and materials furnished by the plaintiff, in erecting a dwelling house at Port Ewen. On the 5th of December, 1859, the Pennsylvania Coal Company conveyed to the defendant, James Cusack, a lot of land at Port Ewen,

pursuant to a contract between the company and him. The defendant, Patrick Cusack, furnished a portion of the money for the purchase of said lot. After such conveyance to James Cusack, he and Patrick made a verbal agreement by which the lot was to be divided, James to have the south and Patrick the north part. James built a house upon the south part of the lot and occupied it. Subsequently a cellar was dug upon the north part of the lot, upon which a house was to be built for Patrick. After the cellar was finished, a fence was erected across the lot. Patrick entered into an agreement with the plaintiff, by which the plaintiff was to furnish the materials and erect a dwelling house for Patrick upon the north part of said lot. A memorandum of such agreement was made, but not signed by either party. The plaintiff commenced the work, and from time to time, as the same progressed, received money from Patrick, and when the house was completed Patrick took possession of it and occupied it. Patrick also built a barn upon the same lot, in rear of the house. James was upon the premises a part of the time during the erection of the dwelling house, carried some brick, and did some other work about it, for which he was paid by Patrick. James held the deed of the whole lot purchased of the company. Patrick insisted that the work was unskillfully performed by the plaintiff, and that the materials were defective. Evidence was produced by the respective parties upon that question, and the referee made a deduction from the contract price. The referee reported due the plaintiff $644, including interest, from the defendants, and that the plaintiff had a lien upon the building and the lot upon which it was erected, to the extent of the recovery. Judgment was entered in favor of the plaintiff against the defendants, accordingly, and the defendants separately appealed from such judgment.

Lawton & Stebbins, for the appellants.

Schoonmaker & Hardenbergh, for the respondent.

By the Court, INGALLS, J. No question is raised as to the regularity of the proceeding by which the lien was sought to be established. The question whether the work was executed according to the agreement was fully investigated before the referee, each party producing evidence in reference thereto, and of the amount of damage occasioned by the failure of the plaintiff to execute the work agreeably to the agreement. And an allowance of $57.50 was made by the referee, which was deducted from the plaintiff's claim. I think the referee properly disposed of that branch of the case. This case is quite unlike a class of cases cited by the appellant's counsel, of which *Smith* v. *Brady*, (17 *N. Y. Rep.* 173,) is an instance, where payment for the work was, *by express agreement*, made to depend upon the production of the certificate of an architect, of the completion of the work. In that case the court held that the production of such a certificate was a condition precedent to such payment, and that the plaintiff was not justified in commencing the action, before producing such certificate, or rendering a substantial reason why it was not produced. In the case at bar there is some evidence based upon the declarations of Patrick Cusack, tending to show an acceptance of the work, in addition to the presumption which arose from the occupancy of the building by him. I conclude, therefore, that the defendant, Patrick Cusack, has no substantial ground of complaint, and that as to him the judgment should be affirmed with costs. After a careful examination of the evidence, I fail to perceive upon what principle the defendant, James Cusack, can be held liable. It is quite evident that he was not a party to the original contract. The evidence does not, in my judgment, even tend to connect him with the agreement under which the work was done, and materials furnished. It is true he did some work about the building, carrying brick, &c. and conversed with his brother and others in relation to the building. For the work he was paid by his brother. Both James and Patrick expressly testify that James was not a party to the con-

tract and had no interest in the work. It is quite obvious that the referee held James liable because he held the legal title to the whole lot. In that I think he erred. It is true he held the deed, and had not conveyed to Patrick the north part of the lot. There was something in this case beyond the payment of a portion of the purchase money by Patrick. There was an agreement that Patrick was to have the north part of the lot, which was followed by the erection of a fence, and the building of the house and barn on that part of the lot which in the division was allotted to Patrick. James built upon, and actually occupied, the south part of the lot up to the division fence. No more unequivocal evidence of ownership in Patrick of the north part of the lot, short of a conveyance, can be conceived. It can hardly be doubted, but that the court would direct a conveyance by James to Patrick, or to whomsoever succeeded to his rights, of that portion of the premises occupied by Patrick. It has been repeatedly held that a parol partition between tenants in common, accompanied by actual possession, in accordance therewith, will bind the parties and those claiming through or from them. (*Mount* v. *Morton*, 20 *Barb.* 124, 121. *Jackson* v. *Harder*, 4 *John.* 202. *Ryerss* v. *Wheeler*, 25 *Wend.* 434.) I think the same principle will apply between James and Patrick, under the circumstances of this case. Neither question the validity of the division, and certainly would not be allowed to, against parties who had been induced to expend money or incur liability upon the faith of such partition. I therefore conclude that the interest of Patrick Cusack, in that portion of the premises upon which the house was erected, was of such a nature as to constitute it the subject of the lien in question. (*Loonie* v. *Hogan*, 9 *N. Y. Rep.* 435. *Ombony* v. *Jones*, 21 *Barb.* 520, 528. *Hauptman* v. *Catlin*, 4 *Abbott's Pr. Rep.* 472. *Randolph* v. *Leary*, *id.* 205. *Miller* v. *Clark*, 2 *E. D. Smith*, 543. *McMahon* v. *Tenth Ward St. Com. N. Y.*, 12 *Abbott's Pr. Rep.* 129. *Crary's N. Y. Pr.* 200. *Tiffany & Smith's N. Y. Pr.* 284.)

By the judgment in this action James Cusack is rendered personally liable for the debt, and I fail to discover upon what principle. It is contended by the plaintiff's counsel that James was estopped by his conduct in relation to the work from denying his liability. I do not perceive from the evidence an act or declaration on his part which could properly influence the conduct of the plaintiff in relation to the matter. (*Dezell* v. *Odell*, 3 *Hill*, 215.)

There must be a new trial, with costs to abide the event; unless the plaintiff shall elect, within twenty days, to discontinue the action, as to the defendant, James Cusack, with costs; in which event the judgment should be affirmed as to Patrick with costs, and reversed as to James with costs.

[Albany General Term, March 7, 1865. *Peckham*, *Miller* and *Ingalls*, Justices.]

The City of Utica *vs.* Churchill and others.

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National banks created by the acts of congress of February 25, 1863, and June 4, 1864, are lawfully created, and are to be deemed and taken to be agencies created for the purpose of carrying on the operations of the federal government.

A tax on a stockholder, for the stock held by him in one of these banks, is a legitimate and proper subject of state or municipal taxation, and the stockholder is liable to be so taxed, under the laws of the state.

A tax upon a stockholder, for the stock held by him in a national bank, is not a tax on the bank, nor on its property, but is upon property held and owned by the stockholder, only, and in which the bank has no manner of interest.

The laws of the state, and not the laws of congress, are to furnish the guide by which to ascertain whether the stock of the national banks can be taxed, and the place and manner of taxing them.

The stock of the national banks is personal property, and is therefore taxable under the first section of the New York tax law, which declares that all land, and all *personal estate* within the state, whether owned by individuals or by corporations, shall be liable to taxation, &c.

City of Utica v. Churchill.

Inasmuch as national banks can not be taxed on their capital, the stock holders are subject to taxation, on their stock, under the 14th section of the New York tax law.

But stockholders can not be lawfully assessed, in the ward or town in which the bank is located, when their residences are in other towns or wards, or in other states.

THE defendants are the stockholders in the Second National Bank of Utica, a corporation duly organized under the act of congress, approved 25th February, 1863, entitled, "An act to provide a national currency, secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof." The bank is located and doing business in the first ward of said city. The defendant Churchill resides in said ward; Brayton in the third ward; Woolcott in the town of Whitestown, in said county of Oneida; Foote in Hamilton, Madison county; and Miller in the city of Washington, in the District of Columbia.

The city of Utica is divided into seven wards, each of which elects an assessor, and these assessors prepare the assessment rolls, for their several wards, upon the valuation in which the city taxes are levied and collected. The several defendants above named were assessed in the said first ward, for the amount of stock held by them severally in said bank, and warrants have been issued for the collection of the city tax so assessed. In making up the assessment roll of said first ward, the defendant Churchill was assessed for property owned by him, other than said stock, and his name was entered in alphabetical order on the roll. But he and the other stockholders in said bank were assessed separately for the said stock, and their names were entered at the end of said roll, so that as to Churchill, there were two assessments against him on said roll.

The right to impose this tax was rested, by counsel, upon a proviso in the 41st section of the act of congress, approved June 4, 1864, being chapter 106 of the laws of that year, which is in the following words, viz: "Provided that nothing

in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes, imposed by, or under state authority, at the place where such bank is located and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state. Provided further, that the tax so imposed under the laws of any state, upon the shares of any of the associations authorized by this act, shall not exceed the rates imposed upon the shares of any of the banks organized under the authority of the state, where such association is located. Provided also, that nothing in this act shall exempt the real estate of associations, from either state, county or municipal taxes, to the same extent, according to its value, as other real estate is taxed."

The capital of the bank is invested in stocks of the United States. The defendants having refused to pay said tax, the city and the defendants agreed upon the facts, hereinbefore stated, and submitted the question of the liability to pay the tax so assessed against the defendants, to the court, pursuant to § 372 of the code of procedure.

N. Curtis White, for the plaintiff.

Miller, for the defendant.

MULLIN, J. The operations of government can not be carried on without the expenditure of money, and that expenditure must be supplied by taxes, collected from its citizens. The power to tax is therefore necessarily inherent in government, and indispensable to its existence. From the very nature of the case, such a power is supreme. If it is limited, it must be by the constitution that brought it into being, or by force of conditions, imposed by some other and superior authority.

The people of this state, acting through a convention, lawfully assembled, gave their assent to the creation of the federal government, whose constitution conferred upon it certain powers and duties, for the common welfare, which necessarily limited the power of the states, as well to impose taxes, as to exercise other rights of sovereignty, inconsistent with the rights conferred on the national government. Some of these restrictions upon the power of the states, to impose taxes, are expressly declared in the constitution of the United States; others are implied from it. By subdivision 2 of § 10, article 1st, it is declared that "no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. * * * No state shall, without the consent of congress, lay any duty of tonnage."

The implied prohibitions are against imposing taxes on the real or personal property of the United States, or upon any agent, or instrument, employed by it in the exercise of its constitutional powers, or on any evidence of indebtedness which it may issue for money borrowed by it.

It is not declared in the constitution of the United States, that the states may not tax the custom houses, post offices, arsenals, or other property owned by the federal government. But as the states, if not restricted, might impose on such property such oppressive taxes as to compel the government to abandon it, and thus successfully drive out the post masters, custom house officers, and other officials of the government, and thereby effectually withdraw the state from its allegiance to such government, it became necessary to withhold from the states the power to accomplish such a treasonable purpose. If a state may tax the evidences of indebtedness issued by the United States, in payment of loans, *ad libitum*, such securities must necessarily be depreciated to the extent of the tax, and in this way the ability of the government to borrow money would be effectually destroyed.

These considerations led the supreme court of the United States to declare the law to be that the states could not impose taxes upon the property of the United States, or upon any of the agents or instruments employed by it. A brief review of the cases will best illustrate the principles above mentioned, and the extent to which the court has gone in applying them.

In *Dobbins* v. *The Commissioners of Erie County*, (16 *Peters*, 435,) the defendants had assessed the plaintiff for his salary as captain of the United States revenue cutter stationed in the Erie revenue district. The tax was paid, and the plaintiff sued to recover it back on the ground that a state could not tax the office, and thereby lessen the compensation paid by the government for the officer's services. The reasoning of the court was, that the state could not tax a custom house revenue cutter, or other instrument employed in collecting the revenue, and as the collector of the customs and captain of the revenue cutter were but agents used for the same general purpose, and as the officer could not be employed without compensation, it followed that if the state could tax his office or salary, it could absorb it altogether, and thus deprive the government of an officer in that or any other department.

In *McCulloch* v. *The State of Maryland*, (4 *Wheat.* 316,) the state of Maryland by an act of its legislature, imposed a tax on all banks or branches thereof in said state, not chartered by such legislature. The Bank of the United States had been previously incorporated by congress, and established one of its branches in Baltimore. The act provided that the bills issued by every such bank should be stamped, and for such stamps certain rates enumerated in the act were required to be paid to the treasurer of the state. The bank was permitted to commute by paying a sum in gross each year, but in default of doing the one thing or the other, a penalty was imposed on the bank. The suit was brought for the penalty, and the plaintiff recovered, and from that judg-

ment an appeal was taken to the supreme court of the United States. Chief Justice Marshall delivered the opinion of the court in favor of reversing the judgment. The opinion is one of the ablest ever delivered by that learned and able judge. After an elaborate examination of the question whether congress had power to create a corporation and clothe it with banking powers, he proceeded next to an examination of the power of the state to impose upon the bank the tax, for the non-payment of which the action was brought, and he lays down the following rule by which to determine whether the subject of taxation is within the reach of the state laws, or is excluded from them: "All subjects over which the sovereign power of the state extends, are objects of taxation, but those over which it does not extend, are, upon the soundest principles, exempt from taxation. The sovereignty of a state extends to every thing which exists by its own authority or is introduced by its own permission, but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state; they are given by the people of the United States to a government whose laws, made in pursuance of the constitution, are declared to be supreme; consequently the people of a single state can not confer a sovereignty which will extend over them."

In *Weston & Co.* v. *The City Council of Charleston*, (2 *Peters*, 449,) the city levied a tax on stocks issued for loans made to the United States, and the constitutional court of South Carolina, being the highest court of law in the state, held the tax to be legal, and the case was carried to the supreme court of the United States. The judgment of the constitutional court was reversed, and the ordinance of the city council taxing the stocks of the United States declared unconstitutional. Chief Justice Marshall again delivered the opinion of the court, and he states the conclusion arrived

at by the court in the following words, viz: "The tax on government stock is thought by the court to be a tax on the contract—a tax on the power to loan money on the credit of the United States, and consequently to be repugnant to the constitution."

The principle of the case last cited was reaffirmed in the case of *The People*, ex rel. *The Bank of Commerce*, v. *The Commissioners of Taxes and Assessments for the city and county of New York*, (2 *Black*, 620.) In that case the defendants had assessed the relator for the whole of its capital, notwithstanding a part of it was invested in stocks of the United States. The judgment of the court of appeals of this state, holding the assessment valid, was reversed. The assessment was held to be unconstitutional and void.

The same conclusion was arrived at in the more recent case of *The Bank of the Commonwealth* v. *The Commissioners of Taxes &c. of the city of New York*, not yet reported. In that case the defendants had assessed the bank for the whole of its capital, notwithstanding it was shown to them that the whole capital was invested in stocks of the United States. This assessment was sought to be sustained under an act of the legislature of this state, passed in April, 1863, and after the decision of the case of *The Bank of Commerce*, cited *supra*, and which declared that all banks, &c. should be liable to taxation on a valuation equal to the amount of their capital stock paid in or secured to be paid in, &c., the supreme court sitting in the first district, and the court of appeals, held the assessment valid. But the supreme court of the United States reversed the judgment, holding that a tax on a valuation equal to the amount of the capital, was a tax on the property of the corporation, and as the property of the bank consisted of stocks of the United States, the assessment was illegal.

In *Osborn* v. *The President &c. of the Bank of the United States*, (9 *Wheat.* 738,) the legislature of the state of Ohio had passed a law taxing all banks and individuals and com-

panies, transacting business in that state without being allowed to do so by the laws thereof, and it imposed upon the Bank of the United States, if it should continue to do business in said state after a day named therein, a tax of $50,000 for each office of discount and deposit. The auditor of the state proceeded to enforce said tax by seizure and sale of the property of the bank. A bill was filed in the circuit court of the United States for Ohio, to restrain the auditor of the state and those acting under him, from collecting said tax, on the ground that the state could not enforce a tax on the bank. The circuit court gave judgment in behalf of the plaintiff, requiring the defendants to restore to the bank the money and property taken. An appeal was then taken to the supreme court of the United States, and the judgment of the circuit court affirmed; the court holding the case to be within the principle of *McCulloch* v. *The State of Maryland*, (4 *Wheat.* 316;) that it was a tax upon the bank, an agent created by congress for the purpose of carrying on the fiscal operations of the government, and was, therefore, as clearly beyond the power of state taxation, as was a custom house, or post office, owned and occupied by the United States.

There are other cases varying from those cited in these facts, but all involving the same principle; and indeed the cases cited, while they show in how many ways the states have attempted to subject to taxation the property of the general government, or the agents employed by it in the execution of its powers, do also show that these attempts have in every instance been met by the judiciary and defeated by the application of the principle that the federal government, in the exercise of the powers conferred upon it by the constitution, is supreme, and that no state has the power, under the constitution, to interfere with it in any manner, or with the agents or instruments employed in carrying its powers into operation. That a tax upon its property, or upon its evidences of debt given by it upon the loan of money, is

an unlawful interference with, or restriction upon, the constitutional functions of the government, and is, therefore, unconstitutional and void.

In the course of the preceding remarks, it has appeared that the supreme court of the United States has held the act creating the Bank of the United States to be a constitutional exercise of the legislative powers vested in congress, and it was so held on the ground that although no express power is given by the constitution to congress, to create a corporation for banking or other purposes, yet in addition to the enumerated powers granted it, it was clothed with such other powers as were necessary to carry into operation such express powers, and that, therefore, congress was at liberty to determine for itself what means or agencies it would employ to give effect to the enumerated powers; that it was, therefore, competent for congress to create a corporation and clothe it with banking powers, if in its judgment such an institution was a proper agency or instrument to effect the object intended. It was also decided that it was competent for congress to authorize the bank to create and locate branches, in its discretion, and that such branches were as effectually protected from taxation by the states as was the bank itself. (*See McCulloch* v. *The State of Maryland*, 4 *Wheat.* 316, *and Weston* v. *The City Council of Charleston*, 2 *Peters*, 449.)

If it was within the constitutional power of congress to create one corporation and clothe it with banking powers, it would seem to follow that it might create one hundred, or one thousand, if in its judgment such number was necessary in order to the due execution of the powers conferred by the constitution on any of the departments of the government. When any body, tribunal or officer is clothed with a discretion as to the means which may be used to attain a given end, that discretion is not reviewable; when exercised, it is to be taken as a lawful and legitimate means to attain such end. However much the courts might differ from congress

as to the wisdom or propriety of creating banks to aid in carrying on the operations of government, yet the courts are not authorized to review the action of congress in that behalf, and therefore banks, when created by congress, must be held to be constitutional agents, and entitled to all the immunities and privileges belonging to such agents.

If these views are correct, it follows that the national banks created by the acts of congress of the 25th February, 1863, and of June 4th, 1864, are lawfully created, and are to be deemed and taken to be agencies created for the purpose of carrying on the operations of the federal government.

The cases to which I have referred, decided three propositions affecting these national banks:

1st. That they can not be taxed by the states.

2d. That stocks of the United States held by them, and forming a part or the whole of their capital, are not the subject of state taxation, when the tax is imposed on their capital at its market value.

3d. That the stocks of the United States, when held by them otherwise than as capital, are not taxable by the states.

In the case before us, the tax is not on the bank or its capital, nor is it, *co nomine*, on stocks of any kind; *but is upon the stockholder for the stock held by him in such bank.* The defendants' counsel insist that it is immaterial in what form the tax is levied; it is in fact upon the property of the bank, and that property consists of United States stocks, and these stocks are not subject to be taxed for any state or municipal purposes. If this proposition is correct, the conclusion drawn from it would be unquestionably sound. But I am quite clear that it is unsound, and that a tax on the stockholder for the stock held by him in one of these banks, is a legitimate and proper subject of state or municipal taxation.

When one of these institutions is created, a subscriber for its stock pays over his money and receives in return a certificate that he is a stockholder in said bank, and is entitled to

an interest in it equal to the number of shares for which he subscribes; that is to say, that he is entitled to a share of its earnings, and in case of dissolution, to a share of its property or its proceeds in the proportion that the number of shares held by him bears to the whole number of shares into which the capital was divided. In other words, a legal being has been created, to whom he has paid his money, and from whom he has received in payment therefor a certificate entitling him to a share of the property of such being, or body, in proportion to the amount paid. This legal entity is, after the payment of the money to it, the lawful owner of it, and can dispose of the same at its own pleasure. The subscriber has no longer a particle of legal interest in the money thus paid, and is not for any purpose to be deemed the owner of it. He is the owner of the shares of stock, and these shares are declared by the 12th section of the act of 1863 to be personal property. This personal property the subscriber has purchased with his money, and it is the representative of the money, or of so much thereof as the assets of the bank may be able to pay. This is the intrinsic value of the stock. The market value may be more or less, depending on the demand for it, which is to some extent regulated by the confidence the public may have in its management, and on the value of money.

In the stock held by its stockholders, the bank, the corporation itself, has no legal interest whatever. Burthens imposed on the stock do not affect the bank or its resources. If the stock is seized by the state, or other authority, for debts due from the stockholder, and confiscated, or otherwise disposed of, the bank is not injured, or its ability to do business impaired to the extent of a penny. A tax, therefore, on the stockholder, for the stock held by him in a national bank, is not a tax on the bank, nor on its property, but is upon property held and owned by the stockholder only, and in which the bank has no manner of interest. In thus holding, we but reaffirm the views of Chief Justice Marshall.

In *McCulloch* v. *The State of Maryland*, after assigning his reason for holding that the state could not impose a tax on the Bank of the United States, he says: "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank in common with the other real property within the state; *nor to a tax imposed on the interest which the citizens of Maryland may hold in the institution in common with other property of the same description throughout the state.*"

In the case of *Bulow* v. *The City Council of Charleston*, (1 *Nott and McCord*, 527,) it was held that stock in the Bank of the United States in the hands of individuals, may constitutionally be taxed by a state. (*See also the same point*, *State* v. *Collector*, 2 *Bailey*, 654.) I am not aware that it has been held in any of the states that stocks held by citizens in the Bank of the United States was not subject to taxation by the states; and if the stock of that bank was taxable, it follows that the stock of the national banks brought into being by the same powers, and for the same purposes, must also be taxable.

The defendant's counsel has argued with some earnestness that if the power to tax these banks, or the stocks of the United States held by them, or others, was withheld because the state might by that means destroy the banks, and impair the credit of the government, as a borrower of money, thus interfering with, if not abrogating the powers conferred by the constitution on the federal government, the same results are allowed by permitting the states to tax the holder of stock in these banks, for the stocks held by them; that when the power to tax is conceded to be in a state, the amount which shall be collected rests wholly in its discretion. It may therefore impose on the stockholder such oppressive taxation as to compel the winding up of all this class of banks in the states.

It must be conceded that this injustice, this gross abuse of power, and disregard of the rights of the federal government, may be committed; but if the power and jurisdiction of the states are to be regulated by, or made to depend upon the liability of such rights and jurisdiction to be abused, or to be exercised to the prejudice of the United States, they would very soon be deprived of all power; because there is scarcely a power vested in the states which may not in some way, and at some time be wielded against the general government. In the exercise of the taxing power the state may take from the citizen all, or so much of his property as to disable him from paying taxes assessed by the federal government; but who would venture to deny this power to the state because of the possibility that it might be abused? The powers of government must be vested in some man or body of men, and it must be done notwithstanding the known and uniform tendency of those clothed with power to abuse it. All arguments resting on this tendency to abuse power must be addressed to those who grant it, not to the judiciary, whose province it is to decide whether the powers conferred have been lawfully exercised.

It is true that in a case of doubt as to whether the constitution or law confers power in a given case, it is right to take into consideration the mischiefs which may result from giving or withholding it. But this is done only for the purpose of arriving at the intention of those who made the constitution or law; as it is reasonable to presume that a power would not be granted which would be productive of great evils, nor withheld if it would be productive of great good, if fairly within the purposes and objects for which the power was intended to be wielded.

If a state should, in disregard of its duty to its citizens, or the federal government, impose on banks created by that government, greater taxes than it imposes on those created by its own laws, with the intent of thereby driving out or embarrassing the general government, I can not doubt but

that the courts would correct the abuse. But whether the courts have such a power or not is not very important; it is enough to know that the mere liability to abuse the right to tax the stockholders of these national banks is no reason why the power to tax them should be denied or withheld.

I am therefore of the opinion that the stockholders in the Second National Bank of Utica are liable to be taxed for state or municipal purposes under the laws of the state.

I now come to the next and only remaining question of any importance in the case, and it is, whether these stockholders being taxable, they can be lawfully taxed in the first ward of the city of Utica where the bank is located, notwithstanding their residences may be in other towns or in other states. The proviso in the 41st section of the act of 1864, declared that the stockholders in these banks are taxable at the place where the bank is located, and not elsewhere. If the power to tax is derived from this clause of the statute, then the defendants are properly taxed; but if congress has no power over the subject of taxation by the state, then the liability must be determined by the state law, and not by the act of congress.

The power to tax is an attribute of sovereignty, and the constitution of the United States out of the way, is absolute in the states. The power is however limited by the constitution, so as to prevent the states from interfering with the lawful exercise by the federal government of the powers conferred on it by that instrument. The supreme court of the United States in the cases cited, puts its decisions that the states can not tax the agencies used by the general government in the exercise of its functions, solely on the ground that the exercise of such power is forbidden by the constitution. It can not require argument to demonstrate that when the constitution of the United States forbids the exercise of a power by the states, or exempts certain subjects from the operation of state law, congress can not grant to the state

any such power, or release the subject from the operation of the prohibition, unless expressly authorized so to do.

The constitution permits congress giving to the states its consent for them to levy imposts or duties on imports, or of tonnage, or to keep troops and ships of war in time of peace, or to enter into any agreement or compact with another state, or with a foreign power, or to engage in war; but beyond these congress has no authority to surrender any power conferred on any department of the government. If such a power existed, congress might utterly abolish the government of the United States. If it can yield one power, it can all. If the states can be released from the prohibition to exercise one power, they may be from all, and thus a dissolution of the Union be successfully accomplished without resort to ordinances of secession, and without the shedding of blood.

Sec. 8 of the 1st article of the constitution has seventeen subdivisions, each one of which contains a grant of one or more powers to congress, all of which are to be exercised exclusively by it, except the few cases already mentioned, in which the states may, by consent of congress, exercise the same. Among these powers exclusively vested in congress, are borrowing money on the credit of the United States, coining money, and declaring war, and raising armies and navies. The surrender of any of these powers to the states would inevitably destroy the government. The inability to borrow money, declare war, raise armies and navies, would leave it utterly helpless and at the mercy of its domestic and foreign enemies. A government without these powers would be as useless and as helpless as a human being without brains or muscles. Those who brought into being the federal government, never intended to give life to so useless a thing as government without power to support or defend itself. Yet this was precisely the result of their labors, if congress is at liberty to surrender the powers with which it was clothed to any or all of the states.

By the tenth section of the same article, the states are expressly forbidden to enter into any treaty, alliance or confederation, grant letters of marque and reprisal, coin money, emit bills of credit, make anything but gold and silver coin a legal tender in payment of debts, pass any bill of attainder or ex post facto law, or law impairing the obligations of contracts, or grant any title of nobility. That it was the intention to take away from the states these powers in every contingency, is manifest not only in the language of the section itself, but still more clearly by the subsequent clause which enumerates the powers the states may exersise by and with the consent of congress.

If then the tax in question was a tax on the bank or on the stocks of the United States, the authority given by the proviso to tax them would be of no validity. Congress possesses no power to confer on the states any such authority. But the tax is not on the bank or on the stocks held by it, but it is on the personal property purchased by the stockholders, and which is as I have shown, the subject of state taxation, and it is not and never was within the powers of congress to relieve such property from the obligation to pay its full share of the public burthen.

As the state does not acquire its right to tax the holder of the stock in question from or under the act of congress, that act can have no influence in regulating the place or manner of imposing the tax. It has no more control over the subject of the tax than if it had been passed by the parliament of Great Britain.

It is argued with some plausibility, that conceding congress may not have the power to confer on the states the right to tax the stockholders of these banks, yet it has the power to impose such conditions on the banks created by its authority as it deems proper, and as by the law creating these institutions it is made their duty to submit to state legislation, the same end, to wit, the payment of taxes, is attained, that would be attained if congress had the right to permit such

taxation. Admitting the proposition that congress can impose the payment of the state taxes as a continuance of the right to exercise corporate functions, it does not follow that the payment of taxes is thereby secured to the states. The act of congress imposes no penalty on either the banks or these stockholders for a refusal to submit to state taxation. Whatever forfeiture may be impliedly incurred, must be enforced in the United States courts, and thus the states would be left to such remedies as those courts, in the exercise of a very limited jurisdiction over corporations, may be at liberty to declare and enforce, in the absence of all legislation on the subject. Again, the penalty, to be effective, must be imposed on the corporation. But the taxation to which the proviso under consideration refers, is to be upon the stockholders. To hold the corporation responsible for the misconduct of its stockholders, in reference to matters entirely unconnected with the corporation, would be equally unjust and absurd. No such thing was contemplated by the framers of the act. They supposed they had the power to authorize the states to impose taxes on the banks created by the act, and that without such authority the states would be incapable of so doing. Conceding the power to regulate the banks created by congress, and to impose whatever condition should be deemed proper, it is quite clear that the act of congress has failed to impose on the banks the obligation to pay taxes to the states, and that it has not attempted to make them responsible for the acts, or the neglect of these stockholders, in relation to state taxation on them as such stockholders.

The laws of our own state, not the laws of congress, must furnish us with the guide by which to ascertain whether the stocks of these banks can be taxed, and the place and manner of taxing them. The first section of our tax law, (1 *R. S. 5th ed.* 905,) declares that all land, and *all personal estate* within this state, whether owned by individuals or by corporations, shall be liable to taxation, subject to the exemptions thereafter specified. The stock of the national banks *is per-*

sonal property, and therefore taxable. By the fifth section of the same statute, all property, real or personal, exempted from taxation by the constitution of this state or under the constitution of the United States, is exempt from taxation.

I have attempted to show that the stock in question is not exempt by the constitution of the United States, and if not thus exempt, it is not exempted by any other provision of our statutes, unless it be by section 14 of the tax laws. That section is in these words: "The owner or holder of stock in any incorporated company *liable to taxation on its capital*, shall not be taxed as an individual for such stock."

This provision was intended to prevent double taxation; first on the capital, against the bank, and next on the stock, against the stockholders. The capital and the stock, although distinct species of property, are both represented by the same amount of money or property. When a bank is incorporated with a capital of $100,000, and that capital is paid, it represents $100,000, and the stock issued represents another $100,000; yet there is in fact but one sum of $100,000 that ought to be taxed. It is just, therefore, to exempt the stockholder if the capital is taxed, and to exempt the capital if the stockholder is taxed.

When foreign corporations immigrate into the state, or are created here by competent authority, other than the state itself, and transact business here, the legislature may tax them in whatever way it deems best, if they are not exempt from taxation, and all such corporations are liable unless exempt by the constitution of the United States. As the national banks can not be taxed by the state, the contingency has happened, which subjects the stockholders to taxation under the fourteenth section above cited.

But the fourteenth section was intended to apply only to to domestic corporations, as they or their stockholders are subject to taxation at the will of the legislature.

In the case of foreign corporations, they can only be taxed on so much of their capital or property as is actually em-

ployed in their business in this state. The stock held by a citizen of this state in a foreign corporation is doubtless liable to be taxed as a part of his personal estate, independent wholly of the fact whether the capital of the corporation was, or was not, subject to be taxed on its capital.

The defendants being liable to taxation for the stock held by them in the bank, the next, and only remaining question is whether they are liable to be taxed in the first ward of the city of Utica, and it seems to me, that it is clear that such of them as do not reside in that ward are not liable to be taxed there. Section fifth, article first, title second of the statute regulating taxation (1 *R. S. 5th ed.* 908) declares that every person shall be "assessed in the town or ward where he resides when the assessment is made, for all personal estate owned by him." None of these defendants except Churchill resided in the first ward, and they were not therefore liable to be assessed there.

The assessors had no jurisdiction to assess any person in that ward, not a resident of it, and the assessment is consequently void. (*Vide The People* v. *The Supervisors of Chenango*, 11 *N. Y. Rep.* 563. *Mygatt* v. *Washburn*, 15 *id.* 316.)

This disposes of the case, as against all the defendants but Churchill. As to him, I think the assesment is, in form, irregular, but not void. The assessors were bound to put the whole assessed valuation of his personal estate into one column of the roll. They had no right to separate it into parcels, and place his name on the roll as many times as there were parcels. Such a mode of assessment might operate as a surprise, and as a fraud on him. But while such a mode of assessment is quite irregular and improper, it is not utterly void, so that such irregularity does not constitute a defense to the action.

I am of the opinion, therefore, that the plaintiff is entitled to judgment against Churchill, for the amount of tax assess-

ed against him, as a stockholder in said bank, with costs; and the other defendants are entitled to judgment dismissing the complaint as to them with costs.

Judgment accordingly.

[Jefferson Special Term, March 21, 1865. *Mullin*, Justice.]

Trask *vs.* Payne.

An order of the war department, touching the arrest and detention of deserters, and specifying the persons who are authorized to make such arrests, should be construed strictly, and with the precise limitations which it prescribes.

Such an order should not be held to mean that the persons named therein may perform the special duty conferred, as they might some others, by procuration or delegated authority.

It is a case for the application of the maxim *expressio unius est exclusio alterius*.

Giving authority, in such order, to *sheriffs* to make arrests, will not authorize *deputy sheriffs*, as such, to arrest deserters.

Desertion is not a felony, at common law.

In England, the whole matter of desertion is the subject of statutory regulation; and in practice the jurisdiction of the offense is there wholly confined to the military courts.

Such is the rule in this country. And except in military law, desertion is legally unknown to the tribunals of this country.

The extent of the right of a citizen to arrest another is when a felony has been committed in his presence.

A court can never be asked to charge upon the assumption of a fact not only not conceded, but which the testimony strongly tends to disprove.

THE complaint contains two counts: The first is for an assault and battery committed on the 22d day of January, 1863; and the second for wrongfully and maliciously imprisoning and assaulting, &c. the plaintiff the same day. The defendant answers the complaint and alleges that the plaintiff was a deserter from the military service of the United States, and that the defendant was a deputy sheriff, and under and by virtue of an order issued by the president

of the United States, through the secretary of war, he arrested him as a deserter; and that while he had him so arrested and he was in the discharge of his duty as such deputy sheriff, the plaintiff assaulted him, and that he then arrested and held him for the assault upon him as a public officer; and that such arrests of the plaintiff constitute the same assaults, &c. complained of in the complaint. The trial took place at the adjourned Herkimer circuit, before Hon. HENRY A. FOSTER, and a jury, in January, 1864.

The defendant, so far as he was permitted, gave his version of the various arrests, and attempted to justify them under the alleged order of the war department.

This order was "General Orders No. 92," dated "War Department, Washington city, July 31, 1862." The last paragraph of the order was as follows: "The United States marshals in the respective districts, the mayor and chief of police of any town or city, the sheriffs of the respective counties in each state, all post-masters and justices of the peace, are authorized to act as special provost marshals to arrest any officer or private soldier, fit for duty, who may be found absent from his command without just cause, and convey him to the nearest military post or depot. The transportation, reasonable expenses of this duty, and five dollars, will be paid for each officer or private so arrested and delivered."

Roscoe Conkling, for the plaintiff.

R. Earl, for the defendant.

BACON, J. There is no complaint in this case that the amount of the verdict is excessive, or that it was without sufficient evidence to support it. This could not well be said, because if the jury believed, as they had a right to believe, the testimony of the plaintiff, the case was one of great outrage and violence and gross indignity perpetrated on the person of the plaintiff. This cause is before us purely upon the

exceptions taken by the defendant's counsel upon the rulings in the course of the trial and upon the request and refusal to charge at the close of the evidence. It may be remarked here that the several propositions in the charge itself, to which exceptions are noted, are, with one or two exceptions, but re-statements of propositions which had already been ruled, and which had been substantially disposed of by the refusals to charge as requested by the defendant's counsel. Indeed I think the only propositions which had not before been announced were, that it had not been established that the plaintiff was a deserter at any time, and that it *prima facie* appeared that he was not a deserter at the time of the arrest in question. Now the only thing that was material was whether or not the plaintiff was a deserter at the time of the third arrest, for the abuse in respect to which this action is brought. The defendant's counsel argued that there was proof enough to go to the jury that the plaintiff was a deserter both at the time of the first and second arrests. Granting this to be so, that point is entirely immaterial; for, unless the fact is established or proof enough be given to warrant the jury in finding that the plaintiff was a deserter at the time the alleged outrage was committed, the justification of the defendant must fail. But not only does the proof of the defendant come short of establishing this, or raising a reasonable presumption of the fact, the statement of the court that it *prima facie* appeared that the plaintiff was not a deserter at that time, is, in my judgment, entirely sustained. The plaintiff, at the time of his arrest, held a sick leave of absence issued by the surgeon in charge of the hospital at Albany. The paper was proved to have been executed by the surgeon in charge of the hospital, and its authenticity was not questioned by the defendant. He only doubted whether it was a furlough because certain blanks in it were not filled up. The circumstances under which, and the persons by whom, these leaves of absence shall be granted, are purely matters of regulation by the war department,

and we are not to assume that the surgeon in charge of the hospital would undertake to execute a power which he did not possess. As regards third persons it must be deemed sufficient, and even against the government it would doubtless protect the holder from the penalties attached to desertion. The proposition then was correct that *prima facie* it was established that the plaintiff was not a deserter at the time in question, and the arrest and subsequent detention were wholly illegal and unauthorized; and if so, it is rather difficult to see how the defendant was harmed by the rulings upon the legal propositions stated by him, or would be benefitted if we should hold that the judge possibly erred in this part of his charge.

It should be added, further, in respect to some of the exceptions taken in the course of the trial touching certain offers and exclusions of evidence, that the defendant was allowed to swear upon the trial, that he believed the plaintiff was a deserter; that he believed he had a right to arrest him; that he had seen orders and hand bills respecting deserters, and that he had acted in entire good faith. This being so, some of the rulings on the trial were quite immaterial, since the only object of the evidence would be to show that the defendant acted on what he supposed to be reasonable grounds of suspicion, and in good faith, and he had the full benefit of all such presumptions with the jury. It was therefore immaterial to show the fact that the defendant had been informed that the plaintiff was a deserter before he returned home; and it was not only immaterial, but incompetent, within any rule of evidence, to allow the defendant to show that one post master had told him (the defendant) that another post master had informed the witness that the plaintiff was a deserter, and requested that the arrest might be made. The same remark applies to the offer to show that the sheriff had given the defendant a general injunction to arrest deserters. The sheriff had no authority to give any such instructions; but if relevant at all, it was only as bearing upon the good

faith of the defendant, and this he was allowed to testify to in the broadest terms, and to state, in substance, the grounds upon which it was founded.

This is all that need to be said in respect to the exceptions taken in the course of the trial, save the one at folio 65, where the court excluded the order of the war department touching the arrest and detention of deserters. The only material portion of the order was that embraced in the fifth section, which designates what parties are clothed by the department with the functions of special provost marshals, and as such, are directed to arrest any officer or private soldier fit for duty who is absent from his command without just cause. Now the defendant had been allowed to put in evidence the whole of this fifth section, and to testify in respect to it. The order was therefore substantially in the case, and the defendant had the full benefit of all the supposed immunity it gave him before the jury. The order was excluded, not on the ground of informality in form, or defect of proof of its genuineness. It was excluded as incompetent, that admitting it to be well executed and sufficiently authenticated, it formed no defense to the defendant for making the arrest.

This brings us to the discussion of the only exceptions that are of any importance in the case; those arising on the requests and refusals to charge, if indeed they are important, because, as I have already suggested, if the proposition is true that *prima facie* it appeared that the plaintiff was not a deserter, at the time of the arrest, then no order of the war department, even if addressed directly and specifically to the defendant, would be any protection to him; nor would a general power to arrest on the part of a public officer, in a case of felony, constitute a defense. The first and third propositions, to wit, that, as deputy sheriff, the defendant had power to arrest a deserter, and that any citizen has power to arrest any person who is actually a deserter, are founded an a *petitio principii*. They assume that he had the benefit of the order of the war department, and also that he had

proved the very fact which the defendant had failed to establish, and which was necessary to his defense, and the converse of which the plaintiff had established, as ruled by the court. But if we grant all that is necessary for the defendant to assume, in order to be entitled to ask the court to rule as law the propositions thus stated, I am of opinion that neither of them is sound. The order of the war department, it will be seen, is very precise and specific in naming the persons who are authorized to make these arrests. It was a large power to impart, and very likely to be abused, if not carefully guarded. Certain official functionaries are therefore selected and named, and they are the mayor and chief of police of any city or town, the sheriffs of the respective counties in each state, and all post masters and justices of the peace. The order should be construed strictly, and with the precise limitations which it prescribes. It can not mean that these parties could perform this special duty as they might some others, by procuration or delegated authority. It is a case for the application of the maxim, "*Expressio unius est exclusio alterius*," and a deputy sheriff could no more perform this office by virtue of the fact that he was a deputy qualified to discharge as such certain other duties, than a deputy post master could undertake to do the same thing by virtue of his position as related to his principal. The order therefore did not reach the case, and conceding its full force and validity, formed no protection to the defendant.

The third proposition which the defendant's counsel asked the court to charge, is that any person has a right to arrest an actual deserter, and the reason given is that a deserter is a felon, and therefore any citizen has the right to make the arrest. I very much doubt whether, granting that the plaintiff by an act of desertion had committed a felony, the other proposition can be affirmed, to wit, that any citizen has the right to make an arrest. The extent of the right of a citizen to arrest is when a felony is committed in his presence, (*Barb. Cr. Law*, 477,) and this can hardly be assumed to be

such a case. But the proposition, in this shape, is not important, because it is conceded that the defendant in this case was a public officer, and he can undoubtedly make an arrest even upon the information of others, where a felony has been actually committed. Was the act of desertion then, assuming that it existed in this case, a felony at common law, or by any statute rendering the offender amenable to any civil jurisdiction? I do not think either branch of this proposition, which is affirmed by the defendant's counsel, can be maintained. There is no authority, that I have been able to find, that holds desertion to be a felony at common law. On the contrary, Blackstone states (1 *Com.* 415, *Phil. ed.* 1863) that in England an annual statute is passed to punish mutiny and desertion and other military offenses, and committing the whole matter of trial and of punishment to the jurisdiction and discretion of courts martial. He refers indeed, to what he calls a standing law, (18 *Hen. VI, chap.* 9,) which makes desertion, in time of war, felony, and says the offense is triable before a jury; but he is careful to add, that though the law remains in force, it is not attended to—in other words, it has become obsolete. So that in any aspect the whole matter of desertion in England is the subject of statutory regulation, and in practice the jurisdiction of the offense is there wholly confined to the military courts. And such is undoubtedly the rule in this country. The fifth article of the amendments to the constitution of the United States declares that "no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger." This provision practically withdraws the entire catalogue of military offenses from the cognizance of the civil magistrate, and turns over the whole subject to be dealt with by the military tribunals; and, except in military law, desertion is legally unknown to the

tribunals of this country. It does not in the contemplation of the civil law reach the grade of a misdemeanor, and no instance is known in which this alleged offense has been the subject of indictment by a grand jury, or of trial in any court of civil or common law jurisdiction. The judge was right, therefore, in refusing the request to charge as contained in the third proposition of the defendant's counsel.

The second request to charge can not, I think, be sustained as a legal proposition ; but the court was right in refusing to charge it in the terms proposed, because it proceeded upon the assumption of a fact which did not exist, or which it could not be affirmed, had been proved. In declaring that the defendant was justifiable in arresting the plaintiff and holding him until he produced his furlough, it assumes that the plaintiff contumaciously refused to produce the furlough when requested, and that immediately upon its production the defendant released him from the arrest. The testimony of the plaintiff was, that on the occasion of his arrest, he supposed his furlough was at his house and that he unexpectedly found it in his pocket, and handed it to the defendant, who read it and pronounced it no furlough, and subsequently to this, attempted to place iron hand cuffs upon the plaintiff, bound his hands tightly with a cord, and kept him in that condition for many hours, leading him around and tying him up like a wild animal. The defendant, indeed, attempts to contradict this, and while not denying the substantial facts, pretends that this arrest and detention was for an alleged assault upon the person of the defendant. The jury had a right to disbelieve this version, and it was a bold proposition to ask the court to charge on the assumption that he alone had told the truth. A court can never be asked to charge upon the assumption of a fact not only not conceded, but which the testimony strongly tends to disprove. The request was entirely too broad, and was therefore properly refused.

Judgment should be rendered on the verdict in favor of the plaintiff.

MULLIN and FOSTER, JJ. concurred.

MORGAN J. dissented from the proposition that desertion is not a felony at common law, or by statute, being substantially so declared by the rules and articles of war; but he concurred in the result, on the ground that the plaintiff was not a deserter at the time of the arrest for which this action was brought.

Judgment for the plaintiff.

[ONONDAGA GENERAL TERM, April 5, 1865. *Mullin, Morgan, Bacon* and *Foster*, Justices.]

SULLIVAN BABCOCK, Assignee, *vs.* ROBERT L. DILL, impleaded with Elijah Weston.

It is well settled that an agreement by a creditor with a third person to accept less than his demand in satisfaction of it, is valid and may be enforced.

Where the father of an insolvent son entered into a composition agreement with creditors to pay them forty cents on a dollar, which they respectively agreed to accept in satisfaction of their debts; *Held* that the payment of the same by the father to one of the subscribing creditors, and its acceptance by the latter, was a satisfaction of the entire demand, and might be pleaded as such by the son, in an action by such creditor to recover the residue.

The agreement contained a condition that the same was to to be void unless all the creditors signed it. It *seems* that a breach of the condition would not enable the creditor to maintain an action to recover the residue without first restoring what he had obtained under it.

Nor (*it seems*) could such creditor avoid the effect of the satisfaction by showing that the principal debtor had been guilty of fraudulent representations to induce creditors to become parties to the compromise. But if the creditor desires to rescind in such case and prosecute the principal debtor, he must rescind in *toto;* and restore to the father what he has obtained of him under the agreement. *Per* MORGAN, J.

Babcock *v.* Dill.

Where a third person, without the knowledge of the father or son, gave his own note on behalf of the son to one of the creditors, to pay an additional ten per cent to induce the latter to sign the agreement; *Held*, that the note was void, and did not impair the effect of the compromise.

The voluntary payment of such note by the son, after the execution of the compromise agreement, although with knowledge of its character, is not such a ratification of the fraud as to avoid the compromise. MULLIN, J. dissented.

THIS action was brought to recover the balance of a judgment against Robert L. Dill and Elijah Weston, entered up in the supreme court on their confession, January 19, 1850, for $984.78 in favor of Robinson & Brunson; and which the plaintiff claimed by virtue of a general assignment made by Robinson & Brunson to him in December, 1859. The complaint admitted payment of $491.64 October 7, 1853.

Robert L. Dill answered and claimed that the judgment was satisfied by means of a compromise which his father, Samuel Dill, had entered into with the creditors on his behalf, he being at that time insolvent and wholly unable to pay his debts. The agreement was set out as follows: "Agreement made this 7th day of April, 1853, between Samuel Dill of Camillus, Onondaga county, in the state of New York, of one part, and others, the undersigned, of the other part, witnesseth: That the said Dill agrees to and with the undersigned parties of the second part, severally and respectively, that he will, within six months from the date hereof, pay to the undersigned, respectively, forty cents on a dollar of the indebtedness of Robert L. Dill of Camillus aforesaid to them, that is the indebtedness of the said Robert L. Dill individually or jointly with another or others, or as a partner with another or others; such payment to be made to parties of the second part respectively, or by deposit in the Bank of Syracuse in said county, at the election of the said Samuel Dill. The said party of the second part severally agree to and with said Samuel Dill, that on receiving such payment as aforesaid, from said Samuel Dill, they will cancel and discharge such indebtedness of said Robert L. Dill to them

respectively to the full amount of such indebtedness. This agreement is to be void and of no force or effect unless all the creditors of the said Robert L. Dill, as aforesaid, become parties hereto upon the terms and at the per centage aforesaid." It was then alleged that all the creditors became parties, and that Samuel Dill paid to Robinson & Brunson, on their aforesaid judgment, the sum of forty per cent, according to the terms of the agreement, and that the same was received by them in satisfaction of the judgment.

On the trial at the Onondaga circuit, in September, 1863, before Justice MULLIN and a jury, it appeared that Robinson & Brunson had become parties to the agreement as well as others, the creditors of Robert L. Dill; and that Samuel Dill paid to them the forty cents on a dollar upon their judgment, October 7, 1853, and thereupon they gave a receipt acknowledging satisfaction of all claims and demands against Robert. Among the creditors, the name of John D. Norton was subscribed to the agreement; and evidence was produced by the plaintiff tending to show that one A. T. Van Gaasbeck, as the friend of Robert L. Dill, had given him his own note for ten per cent of his indebtedness, in addition to the forty per cent, to induce him to become a party to the agreement. It was also claimed by the plaintiff that there were several creditors who had not signed it; and evidence was also given tending to show that Robert L. Dill paid the Van Gaasbeck note in the following November or soon after, and that he was informed prior to its becoming due that such a note had been given. Robert L. Dill testified that he did not propose, suggest or authorize Van Gaasbeck to give Norton such a note or any thing to induce him to sign the compromise, and that he knew nothing about it until some months after. Evidence was also given by the plaintiff tending to show that Robert L. Dill held out additional inducements to one Charles Laud to become a party to the compromise. The judge charged the jury that if all the creditors of Robert L. Dill signed the agreement, and

none of them received more than forty per cent, the plaintiff was not entitled to recover. That if the giving of the Van Gaasbeck note to Norton was at the instance of, or known to, either Samuel Dill or Robert L. Dill, or was paid by either of them before the compromise agreement was consummated, it was a ratification of the act of Van Gaasbeck and vitiated the compromise. The judge further charged the jury that if the note to Norton was given by Van Gaasbeck without the knowledge of Robert or his father, it did not constitute a breach of the agreement, or vitiate it in any manner. The judge further charged the jury, that if the Van Gaasbeck note was paid by Robert L. Dill or his father, after it was ascertained for what it was given, it would be a ratification of the act of Van Gaasbeck in giving it and would render the compromise void. The counsel for the plaintiff then insisted that there was no conflict of evidence as to the payment of said note by Samuel or Robert after it was ascertained for what it was given; but the judge refused so to hold and submitted the question to the jury.

The plaintiff excepted. The jury found a verdict for the defendant. The plaintiff's counsel moved the court for a new trial upon the minutes, which was denied; and thereupon (the defendant having perfected his judgment) the plaintiff made a case and exceptions and appealed to the general term.

D. Pratt, for the plaintiff. I. The discharge rests on the agreement and not on what is received, for the right of action will not be extinguished unless there be an agreement to receive the thing in satisfaction. (1 *Saund. Pl. and Ev.* 23 *to* 36. 3 *Steph. Com.* 375. 1 *Chitty's Pl.* 613. 2 *id.* 924, 1022. 7 *Ad. & El.* 134.)

II. It was not necessary that there should be any offer to return the amount received, in order to sustain the action. (*Durgin* v. *Ireland*, 4 *Kern.* 322. *Lewis* v. *Jones*, 4 *B. & C.* 506.)

III. It was necessary for the defendant to prove that all his creditors had become parties to the agreement at the rate aforesaid. (*Durgin* v. *Ireland, supra. Cooling* v. *Noyes*, 6 *T. R.* 263.) He also cited 2 *Cr., M. and R.* 422; 5 *Bing.* 432; 2 *T. R.* 763, and 11 *Ad. & Ell.* 1033.

IV. It is not a question of good faith on the part of Samuel Dill, but a question upon the performance of his contract. John D. Norton, a creditor, did not become a party to the agreement at the rate of forty per cent, and it is not material whether Samuel Dill knew of the secret arrangement or not. The question is, did he perform his contract? (*Durgin* v. *Ireland*, and *Cooling* v. *Noyes, supra.*)

V. Besides, Samuel Dill by paying the note ratified the act of Van Gaasbeck and made it his own. (5 *Hill*, 107 *to* 137. 4 *Wend.* 465.)

VI. The verdict of the jury was clearly against evidence. The judge charged the jury that if the note of Van Gaasbeck was paid by Robert or his father, after it was known for what it was given, it would be a ratification of the act of Van Gaasbeck and would render the compromise void. The rulings of the judge must be deemed the law of the case for the jury. Upon this question there was no conflict of evidence.

Wm. J. Hough, for the defendant. I. When a stranger, out of his own means, pays a creditor part of his demand, under an express agreement that it shall be received in full satisfaction, the creditor can not afterwards maintain an action for the remainder of the demand. (*Chitty on Cont.* 784.) Payment of the amount agreed upon extinguishes the debt. (*Russell* v. *Rogers*, 10 *Wend.* 473, 8, 9. *Fellows* v. *Stevens*, 24 *id.* 294, 297. *Breck* v. *Cole*, 4 *Sandf. S. C. Rep.* 79.)

II. The contract is no longer executory; it is *executed*, and the debt is barred until the contract is rescinded. (*Chitty on Cont.* 784.) And they could not rescind the contract and at

the same time retain the fruits of it. (*Moyer* v. *Shoemaker*, 5 *Barb.* 319. *Voorhees* v. *Earl*, 2 *Hill*, 288, 293. *Hogan* v. *Weyer*, 5 *Hill*, 390. *Masson* v. *Bovet*, 1 *Denio*, 69, 74.) The fact that Samuel Dill, or Robert his son, learned of and paid Van Gaasbeck's void note, after the agreement was consummated, does not aid the plaintiff. (*See cases above cited.*)

MORGAN, J. In the view I take of this case, the charge of the judge was quite too favorable to the plaintiff. The plaintiff must get rid of the compromise either upon the ground of fraud, or upon the ground of strict contract. The jury have negatived the allegations of fraud, and I see no reason to disturb their verdict upon any question of fact, which is material to the plaintiff's case. Doubtless Robert L. Dill knew that the Van Gaasbeck note was given to induce Norton to become a party to the compromise, before he paid it. The evidence plainly shows this; but it does not show that he knew of it before the consummation of the agreement by Brunson & Robinson and others. His subsequent knowledge and payment of the note could not relate back to, and vitiate, the compromise. But I do not see any grounds disclosed upon the trial upon which the plaintiff can recover. To understand this case properly, it is necessary to revert to the condition of the parties at the time of the agreement by Samuel Dill to pay forty cents on a dollar of his son's indebtedness. Robert L. Dill, his son, had been unfortunate in business, and it was doubtless the object of his father to extricate him from his difficulties and set him upon his feet again. He therefore agreed in writing that he would, within six months from the date thereof, pay to the creditors severally and respectively forty cents on a dollar of their respective demands; and the creditors on their part, who became parties to the agreement, severally agreed that on receiving such payment from Samuel Dill they would cancel and discharge such indebtedness, to the full amount

Then comes the clause that "this agreement is to be void and of no force and effect unless all the creditors of said Robert L. Dill become parties hereto upon the terms and upon the percentage aforesaid." This clause, I think, was intended for the protection of Samuel Dill. The reason is obvious. Unless he could induce all the creditors to accept the forty cents, he would not have accomplished his object; and the old gentleman did not intend to pay any of his debts unless he could pay all of them, and thus relieve his son from further embarrassment. And I think the necessary import of the transaction is, that the money was to come from the old gentleman and not from his son. It was therefore a special contract between a third person and the creditors of the debtor to accept from him a certain sum in full of their demands. The creditors had no necessary connection with each other, and could not say (as in the case cited where the debtor himself had compromised with his creditors) that the common fund had been diminished in consequence of his undertaking to pay one creditor more than another; but they severally agreed to take the amount and cancel the debt. But the old gentleman's engagement to pay any of them was conditional, that all should agree to it. What interest then had the creditors in that clause of the agreement? They had no interest except to induce all the creditors to unite so as to make the contract binding on Samuel Dill. Robert L. Dill (the son) was not a party to the contract, although the undertaking of Samuel Dill was made for his benefit and to relieve him from his debts. I have some doubt, therefore, whether the clause in question was one of which the creditors could take advantage. At all events, they could not receive and retain the forty per cent and reject that part of the agreement which required them to cancel their debts. If they desired to raise the questions which the plaintiff now raises to avoid the contract, they should have returned the forty per cent to the old gentleman. If they discovered that they had been defrauded into the

agreement, and desired on that account to rescind, they could only do so by returning the moneys which the old gentleman paid them to cancel their demands. It is no answer to say that the contract was for the benefit of Robert L. Dill, and that he ought to be held responsible for the balance of the demand. It was also for the benefit of the creditors; and they must take the burden as well as the benefit of it. It would be an outrage upon the father to keep his money and refuse to discharge his son. The father had an interest in his son's welfare which furnished a highly meritorious consideration for his engagement with the creditors to pay them the forty cents upon the dollar, upon their agreement to discharge his son from further liability. It is not the case of a stranger who officiously steps forward to pay a portion of another's debt. And it is well settled that an agreement by the creditors with a third person to accept less than the demand, in satisfaction of it, is valid and may be enforced. (*See Chitty on Cont.* 641; *Lewis* v. *Jones*, 4 *B. & C.* 506; *LePage* v. *McCrea*, 1 *Wend.* 164, 172.) In *Lewis* v. *Jones*, (*supra*,) the father gave his own note for his son's debt for fifteen shillings in the pound, and was not privy to any misrepresentations relied upon to avoid the satisfaction. Holyroyd, J. said: "With respect to the effect of the representations, if admissible, it may suffice to say that the plaintiff should have returned the note if he intended to say that the agreement for composition was thereby rendered void." So it was held in this court in *Wells* v. *Munro*, (not reported,) that where a creditor, under an assignment which is liable to be defeated for fraud, takes a dividend under it he can not afterwards avoid it without at least restoring the dividend to the assignee. And the general rule undoubtedly is, that a party to a contract, who intends to avoid it on the ground of fraud, can not retain the fruits of it, but must rescind it in *toto* if at all. (2 *Parsons on Cont.* 277.)

It is unnecessary to decide what would be the effect of the transaction in case Samuel Dill had been a party to the

alleged fraud relied upon to avoid the satisfaction of the plaintiff's debt. The subsequent voluntary payment of more than forty cents on a dollar to another creditor would not avoid the satisfaction of the plaintiff's debt. The note of Van Gaasbeck to pay Norton an additional sum given to induce him to sign the composition agreement was illegal and void. (4 *Sandf. S. C. Rep.* 79.) Norton was therefore bound by the composition agreement. There is no evidence that Samuel Dill, the father, was a party to any of the objectionble proceedings of his son or others to induce the creditors to sign it. But if this is not so, those who have subsequently received and retained the forty per cent can not now take the objection that there was some outside arrangement, between the debtor and some of the creditors, that the debtor would ultimately do better by them.

The motion for a new trial should be denied, and the judgment affirmed.

BACON and FOSTER, JJ. concurred.

MULLIN, J. dissented.

Judgment affirmed.

[ONONDAGA GENERAL TERM, April 4, 1865. *Mullin, Morgan, Bacon* and *Foster*, Justices.]

REYNOLDS, *vs.* KENYON, President of the Citizens' Bank.

On the 1st of June, 1857, the plaintiff had in deposit in the bank of which the defendant was the president, the sum of $8000 in cash. The bank also, at the same time, had in deposit and for collection, in behalf of the plaintiff, a note for $2000, made by G., the cashier. On that day the plaintiff, being then at the west, wrote to G. enclosing his check on the bank for $2000, for which he desired G. to remit to him two drafts on New York, for $1000 each. He also requested G. to forward to B. at La Crosse, three drafts, in all amounting to $2000 and apply the same on his (G.'s)

note then held by the bank and past due. The two $1000 drafts were sent to the plaintiff, accordingly, and on the 23d of June G. transmitted, by mail, to B. the three drafts, amounting to $2000. G., however, instead of applying the $2000 upon the note made by him, charged that sum to the account of the plaintiff, on the books of the bank, notwithstanding he (G.) had to his credit, in the bank, a sum sufficient to make good the amount of the drafts. And he did this with the knowledge of the president, who was aware of the plaintiff's instructions, and cognizant of all the facts. The plaintiff was not informed by G. that the amount of the drafts sent to B. had been charged to the plaintiff's account, but received and parted with the drafts as so much money paid upon G.'s note; and when he learned that his instructions had been violated, he repudiated the transaction, and demanded the $2000 from the bank.

Held that an action would lie, by the plaintiff, to recover from the bank the $2000 so charged to his account by G.

Held, also, that the plaintiff having received the money, or its equivalent, without any suspicion that it was not a lawful appropriation of funds belonging to G., or which he had applied with the full knowledge and approbation of the bank, if G. obtained such funds improperly and by an act which, as between him and the bank, could be esteemed and treated as fraudulent, the loss should fall upon the party who had put G. in a position to perpetrate a fraud, and constituted him the apparent owner of the money.

Held, further, that G. being the financial officer of the bank, clothed with power, as to outside parties, to draw drafts and to appropriate its funds, in all matters falling within the apparent scope of his authority, his principal was bound by his acts within that limit, as to all persons dealing with him in good faith.

Such persons are not bound to inquire into facts *aliunde*; the apparent authority is the real authority.

APPEAL from a judgment entered upon the report of a referee. The action was brought to recover the sum of $2000, for money had and received by the defendant for the plaintiff's use. The facts are briefly these: Sometime prior to June, 1857, the plaintiff delivered to the bank for collection a note for $2000, owned by him and made by Grosvenor, the cashier of the bank. During the whole month of June, he had a large amount of money, amounting to several thousand dollars, on deposit in the bank, upon which the bank had agreed to pay him interest. On the first day of June he wrote to Grosvenor, as cashier, from La Crosse, enclos-

ing a check for $2000 on the bank, requesting G. to send him two drafts on New York of $1000 each; and in the same letter he also requested him to send him three drafts, amounting to $2000, and indorse the amount on the said note made by him, the cashier, and then in the bank. On the 9th day of June, Grosvenor, as cashier, enclosed in a letter to the plaintiff the two drafts on New York, of $1000 each, and in the same letter said he would endeavor to comply with the plaintiff's wish in regard to the note. On the 23d of June, without having had any further communications with, or directions from the plaintiff, he wrote a letter as cashier, enclosing the three drafts which were asked for in the plaintiff's letter of June 1st, and said that he sent them at the request and by the direction of the plaintiff. The plaintiff negotiated the draft, and obtained the money upon them, and immediately invested the money in land, and gave the land to his daughter. The plaintiff supposed that the $2000 sent in the three drafts had actually been applied upon his note, until on the 12th of August, when he met Grosvenor at Utica. He then learned from him that instead of doing as he had requested, G. had drawn the drafts as cashier, and charged the amount to him, Reynolds, upon the books of the bank and had not applied the amount upon the note. The plaintiff then repudiated the transaction and Grosvenor agreed to rectify the charge on the books of the bank; and the plaintiff has ever since claimed that the $2000 should apply upon the note and not be charged to him in account. On the 23d of June, Grosvenor had more than $2000 to his credit in the bank, and could have paid this $2000 from his own money on that day, but with the knowledge of the president of the bank, pretending to comply with the request contained in the letter of June 1st, he drew the three drafts as cashier and charged the amount, without any authority, or voucher, to the account of the plaintiff. The bank never demanded the $2000 back from the plaintiff, but refused to pay him $2000 of his deposit, for which this action was brought.

The referee reported in favor of the plaintiff, for the amount claimed.

J. H. Townsend, for the appellant. I. The defendant's exception is well taken to the referee's ninth finding of fact. The finding is not supported by any evidence in the case. The referee finds that the president of the bank assented to the sending of the drafts. The only evidence upon this subject is that of Mr. Kenyon himself, where he says that he "did not consent to his sending the drafts."

II. The defendant's exception is well taken to the referee's finding of fact that the president "was then financial officer of said bank." There was no evidence whatever on this subject, and the fact was quite otherwise, as the office of president was but a nominal non-salaried office. It is sufficient however for the purpose of the exception that there is no evidence whatsoever in support of this finding of fact.

III. It will not be contended that Grosvenor had any right to take the funds of the bank, and with them pay his own debt, and it is equally clear that Grosvenor neither asked for, nor was any credit extended to him at the bank. He either took the *plaintiff's* funds, which the plaintiff insists he did not do, or he wrongfully took the funds of the bank. If Grosvenor without authority took the funds of the bank, the bank can follow and recover the funds, until such time as they shall have come to the hands of a bona fide holder, who has parted with value, and the plaintiff having received and had the benefit of the funds, is liable to account to the defendant therefor. The case of *The Mechanics' Bank* v. *The New York and New Haven R. R. Co.*, (3 *Kern.* 599,) perhaps affords some little light to guide us in this case, as Schuyler in that case "had no power to issue a certificate for shares of stock except upon the condition precedent of a transfer on the books by some previous owner, and the surrender of that owner's certificate." So in this case, Grosvenor had no right to issue the defendant's drafts except upon

the condition precedent of selling the same in the ordinary course of banking business. He certainly might not issue them in payment of his own debt, and if the certificates of stock so issued by Schuyler were void even in the hands of a purchaser in good faith for value, much more is the defendant in this case entitled to follow the drafts to the hands of a party who had obtained them without parting with any value. We think also that we recognize the principle of our proposition laid down quite as strongly as it is necessary for us to claim in this case, in *Comyn on Cont.* 760, (*4th Am. ed.*) as follows: "A factor or agent who has power to sell, can not bind or affect the property of them by tortiously pledging or otherwise disposing of them, either by way of security for, or in satisfaction of his own debt; and where goods are thus pledged or disposed of, the principal may recover them back by action of trover against the pawnee, without tendering to the factor or agent what may be due to him, or without any tender to the pawnee of the sum for which the goods are pledged, although the latter was wholly ignorant that the former held the goods as mere factor or agent." See also *McCaudin* v. *Davis*, (7 *East*, 5;) *Dawbigany* v. *Duval*, (5 *T. R.* 604;) see also 1 *Cowen's Tr.* 94, (*3d ed.*) where we find the same principle recognized in this language: "If my son have a general authority to receive money, he may bind me by a receipt for it, *and if he give it away I can only recover it of the donee.*" *Amidon* v. *Wheeler*, (3 *Hill*, 137,) recognizes the same principle. Where a servant had, with his principal's money, paid to the clerk of the court the amount of a fine against one McCoy, Nelson, Ch. J. used this language: "The money received by him, therefore, was the plaintiff's money, and must be regarded as having been received and as still held for the plaintiff's use." And again, on page 139, "had the defendant received the money, under the circumstances of the case, upon a demand of his own against McCoy, it can not be doubted for a moment that the payment would have been void, and he liable to refund the

amount to the plaintiff." In *Hill* v. *The Supervisors of Livingston Co.*, (2 *Kern.* 52,) the action was to recover the amount of a tax alleged to have been illegally collected, and on page 62 we find this language: "Money realized from taxes levied and assessed by the board of supervisors without authority of law, and paid into the county treasury to the use of the county, and as a part of the county funds, to be employed for county purposes, is money had and received by the county to and for the use of the person whose money has been thus illegally taken from him. It equitably and honestly belongs to him, and unless a county is by some law exempt from the ordinary principles by which the liabilities of natural persons and other corporations are determined, an action will lie against it as a corporation, for the recovery of such money. On something the same principle the Bank of Commerce was allowed to recover of The Marine Bank, (3 *Comst.* 230,) the amount paid upon an altered bill of exchange. (*See also Bank of Orleans* v. *Smith*, 3 *Hill*, 560; *Stalker* v. *McDonald*, 6 *id.* 93; *Henry* v. *Marvin*, 3 *E. D. Smith*, 71; *Merrill* v. *The Bank of Norfolk*, 19 *Pick.* 32.)

IV. The plaintiff, by his letter of June 1, made Grosvenor his agent to purchase the drafts, and in that part of the transaction *Grosvenor acted*, as well as assumed to act as the plaintiff's agent, and although while so doing Grosvenor disregarded his instructions as to the paying for the drafts, still the money coming to the hands of the plaintiff, and he deriving benefit from the transaction, is bound to make good to the bank the purchase price of the drafts. The plaintiff knew that Grosvenor had no funds of his own to draw upon in New York, and when he directs Grosvenor to send him $2000, in three drafts, he intends either that Grosvenor shall purchase the drafts somewhere, or else (which the plaintiff will hardly admit, as in such case his liability would be certain beyond question,) intended that Grosvenor should use the bank's drafts in payment of his individual debt. If the plaintiff intended that Grosvenor should purchase the drafts

of the defendants and pay for them with the avails of the note then in the bank for safe keeping, the case is not unlike to that where a principal furnished his agent with money to make a purchase or (exactly this case,) directed the agent to make the purchase and for the purchase price, pay funds of his own and charge in account to the principal, and the agent makes the purchase, but has the purchase paid charged by the seller to his principal, and the principal receives the goods and applies them to his own use. (1 *Cow. Tr.* 90.) "My servant borrows fifty dollars, which comes to my use, and gives a note in my name for it, I am bound although I had not instructed him to do such acts." "When the master *delivers money to his servant* to procure victuals and the servant buys them in his master's name, but does not pay for them, still the master is liable if the victuals come to his use. (15 *Viner's Abridg.* 309. 1 *Camp.* 85, 109.)

V. Although we do not conceive that the question of notice is involved in this case, for the reason that the plaintiff is in no wise a bona fide holder for value, still it may be remarked that when the plaintiff asks for and receives the drafts of *Geo. Grosvenor, cashier* of The Citizens' Bank, upon the corresponding bank in New York, in payment of *Geo. Grosvenor's individual debt*, he should at least be subjected to inquiry as to how Grosvenor came by authority to pay his individual debt with his official draft. The referee, as appears from his opinion, *overlooks the fact that the drafts were drawn by Grosvenor himself*, and of course bore upon their face notice that Grosvenor was drawing upon the funds of the bank in paying his individual debt. The plaintiff in such case is chargeable with notice. (*Claflin* v. *Farmers and Citizens' Bank*, 25 *N. Y. Rep.* 293.) And we have here just the distinction which the referee seems to have overlooked when he refers to a bank being bound by the teller's certificate of a check which is not the fact, when, as in this case, the teller certifies to the goodness of his own check.

In such case the bank is not liable. (*See the case last above cited.*)

VI. The referee in his opinion seems to concede that if the amount received by the plaintiff from Mr. Grosvenor, had been in property, as in the case of *Henry* v. *Marvin*, (3 *E. D. Smith's Rep.* 71,) above cited, or even in negotiable paper, under our laws protecting only the holder in good faith for *value*, it could have been followed and recovered by the bank. The referee, however, based his decision upon the finding that the three drafts were neither property nor negotiable paper, but money, without ear marks, and for that reason the defendant is left without remedy. We submit that in this particular the referee erred. (*a.*) There is no evidence in the case to support the finding of fact, "that the drafts were resorted to as a means for the remittance of money, &c." There is no evidence whatever upon that point; on the other hand, the plaintiff in his letter of June 1st called for the identical property, i. e. *drafts* which were sent to him. They were not resorted to for the remittance of money, for the money which the referee finds was remitted in this way had not been paid. (*b.*) These drafts were strictly bills of exchange, (3 *Kent's Com.* 86, 7*th ed*; *Edwards on Bills and Notes*, 41; *Story on Bills*, §§ 2, 3,) and as we have shown, under our fifth point, could not have been collected by the plaintiff of the bank; the plaintiff not being a bona fide holder for value without notice; and whatever may be the law governing them in other states or in the United States, as suggested by the referee, they are in this case to be governed by the established laws of this state.

R. Earl, for the respondent. I. The plaintiff was a general depositor, and by his deposit he became a creditor of the bank. (*Angell & Ames on Corp.* 219.)

II. The bank was bound by whatever Grosvenor did as cashier, and notice to him was notice to the bank. (*Angell & Ames on Corp.* 295, 299, 302. *Story's Agency*, §§ 114,

115. *Parsons on Mercantile Law*, 39, 40. *The Bridgeport Bank* v. *The New York and New Haven R. R. Co.*, 1 *Amer. Law Reg., N. S.* 210; *S. C.* 30 *Conn. R.* 231, 270, 271, 272. *The Union Bank* v. *Mott*, 17 *How. Pr. R.* 353.)

III. The first view we take is that this was a transaction between Reynolds and the bank. 1. The bank had received the note for collection, and held it for that purpose. 2. On the 1st of June, Reynolds, in legal effect, wrote to the bank to get the money of Grosvenor, and forward it to him in drafts on New York. 3. On the 9th of June the bank wrote to Reynolds, agreeing to do so. 4. On the 23d of June the bank sent the drafts, according to the previous request and agreement. 5. Reynolds is not affected by what took place in the bank, of which he had no notice, and the bank can not affect him by merely charging upon its own books. 6. It matters not that Reynolds was a depositor and creditor. Suppose he had not been a depositor, could the bank have sent the money to him, and have made him a debtor by charging it to him? 7. Suppose Reynolds, not being a depositor or creditor of the bank, had left a note in the bank for collection against any outside party, and suppose he had requested the bank to collect the money and forward it to him, and it had agreed to do so; and it afterwards sent him the money, giving him to understand that it did it in pursuance of his request and its agreement, could it reclaim the money or make him debtor to the bank, because, instead of collecting the money on the note, it sent its own money?

IV. But if this was not, in legal effect, a transaction between Reynolds and the bank, then it must be treated as a transaction between him and Grosvenor; that is, Grosvenor got the drafts from the bank and sent them to him to pay the note. Taking this view the result must still be the same, and the $2000 must apply upon the note as payment. 1. Grosvenor having been requested to pay the note, and having agreed to do so, can not bind Reynolds by getting the

money on drafts upon his credit without his knowledge, and sending it to him to apply upon the note. 2. Grosvenor's secret intentions at the time are of no account. The legal effect is what we must look at. 3. The bank had notice through Grosvenor and its president that there was no authority to take the money or drafts upon the credit of Reynolds, or to charge them to him.

V. But it is claimed by the defendant that Grosvenor had no right to draw and send the drafts; that he got them of the bank fraudulently, and hence that the plaintiff got no title to them or the money represented by them. This view will not, however, help the defendant. 1. It is not, and can not be, claimed that Grosvenor took the drafts feloniously. (*Fassett* v. *Smith*, 23 *N. Y. Rep.* 252.) 2. The bank never, before the commencement of this suit, treated the drafts or money as having been taken fraudulently or tortiously. It knew just how they had been taken and sent, and yet did not attempt to reclaim them or the money, and did not repudiate the transaction or demand back the drafts or money. 3. In what sense were these drafts fraudulently taken? Suppose Grosvenor had overdrawn his own account on that day $2000, not with the intention of stealing or embezzling the money, but with the honest intention of making it good at some future time—a mere over-draft; and suppose with these funds he had purchased the drafts, and the drafts had been sent to and received by Reynolds, to apply upon the note, could Reynolds, in such case, be made to account for the drafts to the bank? We say not. If, after taking the funds in such a case, he charged them to Reynolds, the wrong would consist in charging them to him, and not to himself. 4. But Grosvenor had more than $2000 to his credit in bank on that day. Hence he had the right to take $2000, and committed no wrong in so doing. He committed the wrong in charging the amount to Reynolds, and in treating his own account as still good, and subsequently drawing it down as if he had not had the $2000. 5. The referee

does not find that Grosvenor took the money or drafts from the bank fraudulently or tortiously. But he finds that he took them honestly, with the knowledge and assent of the president, who was the financial officer of the bank. Fols. 23, 24, 25. 6. It is, however, conceded on the part of the defendant, as we understand, that if Reynolds had become a bona fide holder of the drafts for value the bank could not have reclaimed them, and that Grosvenor so far had authority to issue the drafts that bona fide holders for value would be protected. Now, how does Reynolds stand? He received these drafts, as he supposed, upon his note. He negotiated the drafts for money; paid out the money for land, and gave it to his daughter—all the time acting in good faith, without any notice of any wrong on the part of Grosvenor. Therefore before he got any notice of what was done in the bank, or of any claim by the bank, he parted with the drafts, and the proceeds in no way formed any part of his estate, and had, without any benefit to him, passed out of his reach. Under such circumstances we claim the bank can not recover the value of the draft from him. But if it can recover from any one but Grosvenor, it must be from Reynolds' daughter, who received the proceeds of them, and now has them, without having parted with any value, as a gift. (1 *Amer. Law Reg. N. S.* 35, *and note.* 14 *N. Y. Rep.* 623. 16 *id.* 125. 26 *How. Pr. R.* 1.)

VI. The reasons given by the referee in his opinion are an abundant warrant for his decision.

It is, therefore, submitted that the judgment should be affirmed, with costs.

By the Court, Bacon, J. The substantial facts of this case are not controverted, and admit of no complication whatever; and the principle of law adapted to them ought to be obvious, and of very easy application. On the 1st of June, 1857, the plaintiff had in deposit in the bank, of which the defendant was and is the president, the sum of $8000 in

cash. The bank also, at the same time, had in deposit, and for collection in behalf of the plaintiff, a note of $2000 made by Grosvenor, the cashier. On that day the plaintiff, being then at the west, wrote to Grosvenor, enclosing his check on the bank for $2000, for which he desired him to remit to him two drafts on New York for $1000 each. He also requested Grosvenor to forward to L. S. Benton, by the 23d of June, three drafts, in all amounting to $2000, and apply the same on his note then held by the bank, and past due. The two $1000 drafts were accordingly forthwith sent; and on the 23d of June, Grosvenor transmitted by mail to Benton the three drafts desired by the plaintiff. They were duly received, and the avails at once invested in real estate, which was bestowed as a gift upon his daughter. Instead, however, of applying the $2000 upon the note of Grosvenor, as instructed, and thus cancelling that indebtedness, Grosvenor, in direct violation of his instructions, charged the $2000 to the account of the plaintiff on the books of the bank. This he did, too, with the knowledge of the defendant, who was president of the bank, and who saw the letter of the plaintiff, which contained the only direction in respect to the $2000. He says, indeed, that he did not consent to Grosvenor's sending the drafts, but he was cognizant of all the facts and uttered no protest, and ventured on no remonstrance. If it were of any consequence, this conduct would be held to be a tacit consent to the transaction, binding upon him as an officer of the bank. In sending the money, Grosvenor gave no intimation of the manner in which he had disposed of, or attempted to dispose of, $2000 of the plaintiff's money; but the latter received and parted with the drafts as so much paid upon the note of Grosvenor, leaving his account undiminished, except to the extent that he had directly drawn upon it. And it was not until the 12th of August, subsequently, that he learned of the transaction, when he at once repudiated it, and demanded the $2000

from the bank. Payment being refused, this suit is brought to recover the amount, with interest.

It results from this statement that the defendant's bank had on the 23d of June, 1857, $2000 of the plaintiff's money, which it was bound to pay at any time on demand. Has it paid that money? The defendant's counsel insists that it has; or, to state the proposition in other words — because the cashier of the bank violated the instructions of the plaintiff, and took the plaintiff's money, with the knowledge of the president of the bank, to purchase the drafts remitted, instead of taking his own money in the vaults of the bank and discharging his own debt, therefore the bank is to escape all liability, retain that $2000, and turn the plaintiff over to recover of an insolvent debtor a probably outlawed debt. The principle on which it is claimed that the bank has not only discharged its obligation, but can even follow and recover the funds it has parted with, is that (treating Grosvenor as the factor or agent of the bank, his principal) he could not bind or affect the property of the principal by tortiously pledging or otherwise disposing of it in satisfaction of his own debt; and that property thus pledged or disposed of may be recovered back by action of trover against the pawnee, without any tender of the sum for which it is pledged, although the latter was ignorant of the fact that it was held in a fiduciary capacity.

It seems to me there are several satisfactory answers to this proposition, as attempted to be applied to this case. In the first place, it can not very well be claimed that Grosvenor took these drafts tortiously, and fraudulently converted them. The bank has never so treated the transaction, or, before this suit, attempted to reclaim them upon any such ground. It knew perfectly well how they had been procured, and how they were sent. It knew, or was bound to know, that Grosvenor had to his credit in the bank a sum sufficient to make good the amount of the drafts; and if the bank desired to repudiate the use made of the drafts, it

should have been done promptly, and the plaintiff should have been advised that, unless he consented to such an appropriation of his funds, the amount should either be restored to his account, or the application made to the extinguishment of Grosvenor's debt.

In the second place, the principle may have its appropriate application to personal property capable of transfer by delivery and of identification, but can have no application to money, or that which represents money, which, "having no ear-marks, can not be identified, and which is used as money;" a bank draft, employed as a medium for the transmission of funds, is not personal property, as that term is used and understood. It is not even commercial paper, with the incidents and equities which the *Law Merchant*, as expounded in this state, applies to such paper. It may not be employed, in the strict and technical sense, as a circulating medium, but it passes freely from hand to hand, and, for most commercial purposes, is used as money. I can not perceive any difference in principle between the case as it stands, and that which might have existed if the plaintiff had presented himself at the bank and demanded payment on his note, and Grosvenor, instead of drawing upon New York in the name of the bank for the funds, had taken the circulating notes of the bank, of which he was the custodian, and paid them to the plaintiff, professedly in compliance with the demand of the plaintiff and in discharge of his note. Could the defendant, in such a case, have reclaimed the bills? Above all, could it have done so when the plaintiff received them in good faith as a payment upon his debt, and had already parted with them for property, of which, by a lawful and voluntary gift, he had dispossessed himself? To ask these questions is, it seems to me, to answer them, and the answer effectually disposes of the assumption upon which the claim of the plaintiff in this case is resisted.

There is another principle still, alluded to by the referee in the opinion accompanying his report,(*a*) which demonstrates that the loss in this case, if one or the other party is to suffer, should fall upon the defendant, and not upon the plaintiff. The latter received the money, or that which was its equivalent, without any suspicion that it was not a lawful appropriation of funds belonging to Grosvenor, or which he had applied with the full knowledge and approbation of the bank. If Grosvenor obtained them improperly, and by an act which, as between him and the bank, could be esteemed and treated as fraudulent, still the loss should fall upon the party who has put the person in a position to per-

(*a*) The following is the opinion of the referee, (Hon. William F. Allen:) "The claim of the defendant in substance is, that a creditor receiving money from his debtor is bound to know the claim or title of the payer to the money, and if it in truth is the money of a third person which is held as trustee or which in any manner has come to the possession of the payer, but which he has no authority to use for his own purposes, the receiver can be made to answer for it in an action for money had and received to and for the use of the rightful owner at any time before the statute of limitations runs against the demands. If a cause of action exists at all, it springs from the receipt of the money which it is said *ex æquo et bono* belongs to the claimant, and exists from the time of the receipt, and of course can only be barred as other actions are barred. This is a startling proposition, and if true places the creditors in an awkward and critical position in receiving moneys from their debtors when such debtors may occupy a fiduciary relation to others in which they may have the control of the funds of their principals or wards as *cestuis que trust*. It would put them to an inquiry as to the source of title to the money offered in payment, and to learn the truth upon peril of being compelled to account to some third person for money received as their own, long after the debtor may have become solvent, or perhaps died. If the true owner of money thus appropriated chances to be a *feme covert* or an infant, it may be that very many years will elapse before the least intimation will be given to the party receiving the money that he has involuntarily become a debtor to a stranger. For the claim is that *scienter*, knowledge by the creditor of the source of the title to the money at the time of the receipt, is not essential to his liability to account. In the transfer of commercial paper the rule in this state is that the taker, unless he parts with value at the time, receives and holds it subject to any equities existing against it in the hands of the transferer in favor of any party to it or any third persons claiming title to it. In others states and in the United States the rule is

petrate a fraud, and constituted him the apparent owner of the money. The teller of a bank has no authority to certify that a party has funds in the bank, except the fact is as the paper represents ; and yet if he does thus certify in violation of his duty, for the mere accommodation of a party, and the certified check falls into the hands of a *bona fide* holder, the latter can enforce it against the bank. This precise proposition is decided in the *Farmers' and Mechanics' Bank of Kent County* v. *Butchers' and Drovers' Bank,* (16 *N. Y. Rep.* 125.) That principle is applicable to this case. Grosvenor was the financial officer of the bank, with power to draw drafts and appropriate its funds in all matters fall-

different, and gives a good title to commercial paper to any one taking it upon a good consideration in good faith in the usual course of business. It is not material to inquire which is the best rule. It is enough that even in this state the rule has not been applied to money, that which having no earmark can not be identified or that which is used as money. Now a bank draft is not in any sense commercial paper. It is the means of remitting money from one place to another. It may not be used technically as a circulating medium, and yet passes from hand to hand and is used as money for commercial purposes. It represents so much money paid by the payer to the drawing bank, and is a direction to the drawee to repay that amount to the holder of the draft. It matters not whether coin or bank notes are transmitted directly to the plaintiff, or the coin or bank notes paid to the defendant in exchange for their request to their correspondent in New York to pay the like amount there. In neither case could the plaintiff trace the title of Grosvenor to the money, and in both cases it is a payment of money by Grosvenor to the plaintiff. The case is not at all different from what it would have been if the plaintiff had personally applied to Grosvenor at the bank for the payment of his debt and the debtor had paid him in the circulating notes of the bank or any other current money. The plaintiff could not have known whether he was taking money which was rightfully his, or whether he was abstracting it from the bank. If the plaintiff had then used the same money for the purchase of a bill on New York it would have been on all fours with the case in hand. But it would hardly be claimed I think that the bank could, under these circumstances, recover the money thus paid, of the plaintiff. The fact that Grosvenor claimed to be cashier of the defendants does not affect the plaintiff or touch the question of his liability. Suppose that he had not been such cashier, but had been an executor or trustee having trust money in his hands, and upon being applied to, as in this case, had with those funds purchased the drafts, could the parties whose

ing within the apparent scope of his authority. Such, at any rate, was the power with which, as to outside parties, he was clothed by the bank; and whenever, by comparing the act done with the power, the act is warranted by the terms of the power, the principal is bound as to all persons dealing in good faith with the agent. Such persons are not bound to inquire into facts *aliunde:* the apparent authority is the real authority; *North River Bank* v. *Aymar*, (3 *Hill*, 262;) a case which, from its alleged reversal in the court of errors, may have seemed heretofore to be somewhat shaken, but the principle of which has been often since reaffirmed, and is now firmly established by

money was used in the purchase of the drafts reclaim them? I think not. A party receiving not negotiable paper but money or that which is used for and passes as money, in good faith, is without notice of any defect in the title of the payer, or any thing to cause a suspicion of such title, and in the usual course of business, is entitled to protection, and the loss, if any, must fall upon him who with or without fault has put the person in a position to perpetrate a fraud, if he has not the right to use the money as his own, who has put him in position of apparent owner of the money. A teller of a bank has no authority to certify checks or give certificates of deposit, except when funds are actually on deposit. Nevertheless his certificates are good against the bank as to every bona fide holder, and this is the result of commercial necessity as well as of the rule which holds the principal liable to the extent of the apparent authority of the agent, and for the fraud of the agent in the business of the agency. By whom the drafts were drawn in behalf of the bank does not appear. It may be assumed that they were drawn in the usual way and by the authorized agent of the bank. The bank, therefore, by its authorized agents certified to the plaintiff that it had been paid $2000, and directed that amount to be paid to him, and gave that certificate to his debtor to be used by him in the payment of his debt to the plaintiff, and it was so paid. Who shall suffer? Certainly not the plaintiff, but the defendant if any one, whose president and cashier thus placed in the hands of the debtor this money or the usual representatives of and substitutes for money, to be appropriated to the payment of his debt. In another class of actions stress is laid upon the fact that the party receiving property from his debtor in payment of his debt knows at the time that it is partnership property which the debtor can not lawfully use for his individual purposes. (*Dob* v. *Halsey*, 16 *John.* 34.) Without examining cases in detail, I will only say that I know of no case charging the plaintiff with this money, and that I can not reconcile it with equity or justice, or any principle of law to hold him liable."

the judgment of the court of appeals in *Exchange Bank* v. *Monteath*, (26 *N. Y. Rep.* 505.) In the words of Lord Holt in *Ham* v. *Nichols*, (1 *Salk.* 269,) "Seeing somebody must be a loser by the deceit, it is more reasonable that he that employs and puts confidence in the deceiver should be the loser, than a stranger." It is not necessary, for the protection of the plaintiff, that he occupy in all respects the position of a *bona fide* holder of commercial paper without notice of any defect in his title, although it is true that, before he had any knowledge of the real transaction and of the claim set up by the bank, he had parted with the drafts and disposed of the money, which, without any benefit to him, had passed out of his reach, and formed no part of his estate. He acted in perfect good faith, and on the presumption that Grosvenor and the bank had fulfilled his commission and not misappropriated his funds. I think, upon well-settled principles and the strongest equity, he is entitled to recover, and that the judgment should be affirmed.

Judgment affirmed.

[Onondaga General Term, April 4, 1865. *Mullin*, *Morgan*, *Bacon* and *Foster*, Justices.]

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Conger *vs.* Van Aernum.

The plaintiff, while in the employ of the defendant, and working upon his farm at a specified sum per month, including his board, married the daughter of the defendant, who was then residing with her father, as a member of his family. She continued to reside with, and render services for, her father, being his principal housekeeper, and he furnished her and her two children—issues of the marriage—with food and clothing; without any agreement or understanding, or accounts kept, touching the services of the daughter and the food and clothing of herself and children. And the plaintiff continued to work for the defendant, and to board in his house.

Held that the circumstances did not justify the implication of a promise by

the defendant to pay for the services of his daughter, and a promise by the plaintiff to pay for the board and clothing of his wife and children.

That the claims touching the wife and children should be considered together, and that the plaintiff was not entitled to any thing for the services of his wife, nor was the defendant entitled to any thing for the food and clothing of the wife and children.

Held, also, that the parties having agreed, in March, 1852, for the services of the plaintiff for eight months, at $12 a month, and he having continued to labor for the defendant until March, 1860, without any other agreement being made as to the amount of his compensation, a promise by the defendant to pay what the plaintiff's services, after the expiration of the eight months, were reasonably worth, might be implied.

And that the relation between the plaintiff and defendant was not such as to negative the presumption that compensation was expected and intended, by both parties.

But that the statute of limitations applied to all wages that became due to the plaintiff more than six years prior to the commencement of this action.

APPEAL from a judgment entered upon the report and decision of a referee. The action was to recover a compensation for work, labor and services. The plaintiff, in March, 1851, commenced working for the defendant, on his farm, under an agreement for eight months, at $13 a month, the defendant to board the plaintiff. At the expiration of the eight months, the plaintiff continued work until March, 1852, for his board; when a further agreement was made for the next eight months, at $12 a month and board. The plaintiff continued to labor for the defendant, and was boarded, until about March 1, 1861, without any further or other agreement between the parties. The referee found that such labor and services were worth $160 a year, besides the boarding of the plaintiff. The referee ascertained the amount paid to the plaintiff between March 1852 and March 1861 in the way of wearing apparel and spending money during the six years next prior to the commencement of this action, and struck a balance in favor of the plaintiff. He found that the wages were due at the end of each year, and after applying the value of the wearing apparel, and spending money, he allowed interest on the balance, to the date of the report.

He applied the statute of limitations to all wages that became due more than six years prior to the commencement of the action.

In Nov. 1853, the plaintiff married the daughter of the defendant, who was then residing with her father, as a member of his family. She continued to reside with her father and rendered services for him as she had previously been accustomed to render them, and the defendant furnished her and her two children, issues of the marriage, with food and clothing; there being no agreement or understanding touching the services of the daughter and the food and clothing of herself and the children.

The referee decided that the plaintiff was not entitled to any thing for the services of his wife, and that the defendant was not entitled to anything for the food and clothing of the plaintiff's wife and children. He decided that the plaintiff was entitled to recover $160 a year, less the value of his clothing and spending money, and an item of twenty dollars paid for his use, and to be allowed interest on balances; and he limited the recovery to six years. The defendant excepted to some of the findings of fact, and some of the conclusions of law.

Sickles, Graves & Childs, for the plaintiff.

Bessac & Buller, for the defendant.

By the Court, MARVIN, J. Upon the argument the defendant's counsel made two points: 1. That the relation which the plaintiff maintained, previous to his marriage with the defendant's daughter, as the hired servant of the defendant, was merged in the other relation of son-in-law; and that the defendant had a right to presume that the plaintiff remained with him as a son, instead of a hired servant. 2. If the plaintiff is entitled to receive compensation for his services, then he is bound to pay the defendant a reasonable compen-

sation for the board and clothing of his children. There was evidence, upon the trial, tending to prove the value of such board and clothing, and also the value of the services of the wife, and her board and clothing. The referee in his opinion, and the counsel in their arguments, refer to *Robinson* v. *Cushman*, (2 *Denio*, 149 ;) *Williams* v. *Hutchinson*, (5 *Barb.* 122 ;) and *Dye* v. *Kerr*, (15 *Barb.* 444.)

Robinson v. *Cushman* has little or no application to the present case. In *Williams* v. *Hutchinson* the plaintiff was the infant son of a widow who married the defendant. He became a member of the defendant's family, as one of the children, and was fed, clothed and schooled as such, and he labored upon the farm until he was about seventeen years old. It was held that the defendant stood *in loco parentis* to the plaintiff, and that this repelled all presumption of service for him, or wages, and rendered an express promise indispensable to the maintenance of an action.

In *Dye* v. *Kerr*, the claim was by a daughter, against her father's executor, for thirty years' services. The service was rendered without any agreement for compensation. She lived with her father, as a member of the family, and as such was taken care of.

In the present case a new relation intervened. The daughter of the defendant, and the plaintiff, intermarried. From that time the plaintiff was undoubtedly entitled to the services of the daughter, then become his wife, and he was bound to support her and her children. The question, however, would arise, in the absence of a special agreement, whether the circumstances justify the implication of a promise by the father to pay for the services of the wife-daughter, and a promise by the husband to pay for the boarding and clothing of the wife and children.

The referee has found that "there was never any agreement or understanding that the defendant should pay any thing for the services of his daughter, or receive any thing for her board or clothing, or for the support of her children."

This finding is broad, and includes any agreement, express or implied, and so I think the referee intended. I have looked into the evidence, and am satisfied with this finding. I think, from the evidence, that there was no intention by either of the parties that there should ever be an accounting for the services of the plaintiff's wife, and the board and clothing of herself and the two children, one five and the other three years old, when the plaintiff ceased working for the defendant. The wife continued to discharge the duties of a daughter to the defendant, as also that of a wife to the plaintiff. No accounts were kept; and if there had been, it is not quite clear to my mind, from the evidence, upon which side the balance would have appeared. The defendant's wife was in poor health most of the time, and it appeared that the plaintiff's wife was the principal house-keeper, and rendered valuable services. They were probably quite equal to what she and her children received from her father. The plaintiff claimed compensation for her services; the referee disallowed the claim, and the plaintiff has not appealed. He acquiesced in this decision. The defendant, however, appealed, and now claims compensation for the board and clothing of his daughter's children; that is, unless the claim of the plaintiff, for his services, is disallowed. In my opinion the claims touching the wife and children should be considered together; and I am satisfied with the disposition of them made by the referee.

The claim for the plaintiff's own services is now to be considered. The referee finds that in March, 1852, the parties agreed for the services of the plaintiff for eight months at $12 a month, and that he continued to labor until about March 1, 1860, without any other agreement being made between the parties, relative to the compensation which the plaintiff should receive for his labor and services; and that such labor and services were worth, over and above his board, $160 a year. By allowing this sum, less what the plaintiff had received, the referee has found an implied promise to pay

what the services were reasonably worth. And with the finding and decision of the referee I am entirely satisfied. The relation between the plaintiff and defendant was not such as to negative the presumption that compensation was expected and intended by both the parties. Indeed there is much affirmative evidence in the attempts of the parties to settle, &c. tending to prove that compensation for his services was expected by both parties. The plaintiff was of mature age, a young married man, during most of the nine years. He appears to have been industrious and economical, having the principal charge and superintendence of the farm. He was following the example of other young men in this country, laboring by the month or year, for a period, for wages, with a view to the accumulation of capital with which to set up for himself. The cases above cited are not analogous; nor is *Williams* v. *Hutchinson*, (3 *N. Y. Rep.* 312,) and the cases therein cited.

The judgment should be affirmed.

[Erie General Term, May 2, 1865. *Grover*, *Daniels* and *Marvin*, Justices.]

Chamberlain *vs.* Martin.

Where a mortgage of chattels contains a power to the mortgagee in case of default in payment, to take the property and "to *sell* the same," and apply the avails in payment of the debt, and in case he shall at any time deem himself unsafe, that he may take possession of the property and "sell the same at *public* or *private* sale," previous to the day of payment, the mortgagee may, in case of default in payment at the day, sell the property at *private* sale, without notice to the mortgagor; and if such sale is fair and *bona fide*, the right of the mortgagor to redeem will be foreclosed.

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ACTION to redeem personal property mortgaged by the plaintiff to the defendant. The mortgage was executed April 12, 1842, to secure the payment of a note of the same

date, for $515.77, payable one day after date. The property was one jenny engine and appurtenances, and some wheels and cranks, &c. The mortgage was in the usual form, with a power to the mortgagee, in case of default in payment, to take the property and to "sell the same," and apply the avails in payment of the debt, after deducting all the expenses of the sale, &c. It also contained the clause, that in case Martin should at any time deem himself unsafe, it should be lawful for him to take possession of the property and sell the same at public or private sale, previous to the time mentioned for the payment of the debt, applying the proceeds as aforesaid after deducting all expenses of sale and keeping, &c.

On the 20th of June, 1862, Martin recovered a judgment against Chamberlain on the note. An execution was issued and the property taken and sold by virtue thereof, to Martin, for $55, August 25th. Martin then, by virtue of the sale and the mortgage, took possession of the property and caused some necessary repairs to be made upon it, and in January, 1863, made a verbal contract with one Penfield to sell the property to him for $400. This sale was fully consummated as early as May 1, 1843, and Penfield paid to Martin the whole consideration; and the court found that Penfield, under such purchase, became the owner of the property, and that the sale was a fair sale in the then condition of the market. That prior to that time there was only a limited demand for such property. That soon after the sale such property was in demand and advanced in price, and its value October 24, 1843, exceeded $643, a sum sufficient to pay the mortgage debt, interest, costs and expenses, which sum, on that day, was tendered by the plaintiff to the defendant, and the plaintiff demanded the property, and claimed the right to redeem it. The defendant refused to accept the tender, or to deliver the property.

As a conclusion of law, the court decided that the defendant got no right or title to the property by the sale on execution. Also that the sale of the property by the defendant

to Penfield foreclosed all right, lien or interest therein of the plaintiff; that his right to redeem the property was then gone; and that the plaintiff had no cause of action; that neither party recover costs as against the other; and that judgment be entered accordingly. The plaintiff excepted to some of the findings of fact, and also to the conclusions of law adverse to him. Judgment being entered, the plaintiff appealed to the general term.

A. G. Rice, for the plaintiff.

G. A. Kendall, for the defendant.

By the Court, MARVIN, J. The legal point made by the plaintiff's counsel is that the *private* sale of the property by Martin to Penfield, did not have the effect to foreclose the plaintiff's right to redeem the property. He claims that a private sale was unauthorized by the mortgage, and that in such a case the equity of redemption can only be foreclosed upon a reasonable notice to him. That the same principle should be applied as in the case of a pledge.

The mortgagee was authorized to *sell* in case of default in making payment. The mode of sale is not specified. There is no limitation upon the power. The mortgagee may sell and apply the avails, after deducting expenses of sale, &c. If he should take possession because he deemed himself insecure, then the power to sell at public or *private* sale previous to the time for payment, is expressly given. Was it intended to make a distinction, as to the mode of sale, in the two cases? I think not. But the argument goes further. It is that a reasonable notice of sale must always be given to the mortgagor, or the equitable right to redeem is not lost or barred. In short, that the sale is the same as in the case of a pledge. There is a very marked difference between a pledge and a mortgage, as to the rights of the parties after default in payment.

A pledge is a deposit of personal effects to be retained until redeemed. And although the time for redemption is specified by the agreement of the parties, and the pledgor suffers it to pass and is thus in default, still the property remains in pledge only, and the right to redeem continues until it is foreclosed by acts sanctioned by the law.

"A mortgage is a pledge and more; for it is an absolute pledge to become an absolute interest if not redeemed at a certain time." (*Jones* v. *Smith*, 2 *Ves. Jun.* 378.) Perhaps the definition is not, at this day, precisely accurate. A pledge is the bailment of property. In the case of a mortgage, the property may remain in the possession of the mortgagor. A mortgage of chattels is a sale of them, upon condition, and it the condition is not performed the title becomes absolute at law. The mortgagee becomes, by a failure to perform the condition, a vendee, and he has in law an absolute power over the property. But as cases of great hardship may arise from a failure to perform the condition on the day, which was to render the sale void, courts of equity will grant relief if the mortgagor brings his bill within a reasonable time. As the title is absolute at law, in the mortgagee, immediately after default in performing the condition, I do not see why he may not sell the property, and give to his vendee a perfect title, assuming such sale to be fair and bona fide. He is under no obligation to anticipate that the mortgagor may desire to redeem, and so wait for him to do so. If he and his vendee act in fraud of the equitable right of the mortgagor to redeem, a court of equity may undoubtedly give relief in an action against the mortgagee and his vendee to redeem.

In the present case it is found as a fact that the sale made by Martin, the mortgagee, to Penfield "was a fair sale in the then condition of the market." It seems to me that this disposes of the question of the right of redemption. If it was intended to question the fairness of the sale to Penfield, he should have been made a party, as the remedy by redemption

is to obtain the specific property mortgaged. The question touching the rights of the parties to the sum obtained from Penfield is not involved in this action. The sum was not sufficient to pay the debt owing by the plaintiff (the mortgagor) to the defendant (the mortgagee.)

The judgment can not be reversed upon the ground that material facts found are unsupported by evidence, or were found against the weight of evidence.

I have consulted the following authorities, most of them cited by counsel: *Story on Bailm.* § 287; 3 *Denio*, 33; 12 *Wend.* 61; *Hart* v. *Ten Eyck*, 2 *John. Ch.* 62; *Wheeler* v. *Newbould*, 16 *N. Y. Rep.* 392; *Champlin* v. *Johnson*, 39 *Barb.* 606; *Dane* v. *Mallory*, 16 *id.* 46; *Burdick* v. *McVanner*, 2 *Denio*, 170; *Case* v. *Boughton*, 11 *Wend.* 106; 40 *Barb.* 179; *Story's Eq.* §§ 1030, 1031; 4 *Kent's Com.* 138; 1 *Pars. on Cont.* 452, 591.

Judgment affirmed, with costs of the appeal.

[Erie General Term, May 2, 1865. *Grover*, *Daniels* and *Marvin*, Justices.]

Lee *vs.* Parker.

Where a person, made a party to a foreclosure suit as having or claiming to have some interest in, or lien upon, the mortgaged premises accruing subsequently to the lien of the mortgage, appears and answers, setting up as a defense that the mortgagor was not the owner, or seised of the premises at the date of the mortgage, but that he, the defendant, was owner and in possession of the premises, and had so continued ever since; which claim is not tried before the referee, but by stipulation a judgment is entered, containing a provision that such judgment shall be without prejudice to any adverse title in such defendant, superior to the mortgage; the judgment of foreclosure, and the sale thereunder, will not be conclusive upon such defendant, as to the title of the mortgagor.

But, in an action of ejectment brought by the purchaser at the sale under the decree of foreclosure, to recover the possession, such adverse claimant may set up as a defense any right he had to the mortgaged premises, existing prior to the execution of the mortgage.

Lee *v.* Parker.

MOTION for a new trial, on exceptions. The action is ejectment, for a farm of about eighty acres in Hamburgh, Erie county.

In July, 1842, Henry Parker recovered a judgment in the recorder's court of the city of Buffalo, against the defendant and others, upon which an execution was issued to collect $83.86 and interest. The premises in question were sold by the sheriff, by virtue of the judgment and execution, to one Abraham Lang, and a certificate of the sale was given, dated November 5, 1842. On the 17th of January, 1844, the defendant confessed a judgment in a justice's court to John F Brown, for $30. A transcript was filed and this judgment was docketed January 20, and Brown redeemed from the sale to Lang. The sheriff executed a deed to Brown, dated February 6, 1844. Brown executed a mortgage upon the premises, dated August 21, 1851, to Amelia Kranse, to secure the payment of $1500 in one year. This mortgage, through sundry assignments, came to the present plaintiff March 18, 1856. The plaintiff brought an action in this court to foreclose the mortgage, and made the mortgagor, Brown, and the present defendant, Parker, and another person, parties. The complaint was in the usual form, and as to the defendant Parker it averred that he "has, or claims to have, some interest or lien upon the mortgaged premises, or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of the said mortgage." Parker answered, and denied each and every allegation of the complaint. For a further defense, he alleged that Brown had no title to the premises when he executed the mortgage; that on the contrary he, Parker, owned the premises, and was then, and ever since had been, in possession. There was also a third defense—usury in the mortgage—set up.

The issues in the action were referred to a referee, and the trial came on in January, 1859, when the parties, by their attorneys, stipulated that, upon the reading and filing the report of the referee, "a judgment of foreclosure and sale,

with costs, in the usual form, may be taken in this action, with a provision to be inserted in such judgment that it is without prejudice to any adverse title in the said defendant, Francis B. Parker, to the mortgaged premises superior to the mortgage set forth in the complaint." The judgment was perfected, the roll containing the clause: "This judgment is without prejudice to any adverse title in the defendant Francis B. Parker to the mortgaged premises, superior to the mortgage set forth in the complaint." By virtue of this judgment the premises were sold to the plaintiff, by the sheriff, who executed the usual deed.

The defendant offered, on the trial of this cause, to prove numerous facts; as that the sheriff made no sale of the premises in November, 1842; that he paid the judgment confessed by him to Brown, prior to the redemption; that the pretended redemption was a fraud upon the sheriff, and also upon him; that he paid the judgment upon which the sale was had; that he had no knowledge of any pretended sale or redemption until after the execution and delivery of the mortgage by Brown to Kranse. To each of these offers the plaintiff objected, on the ground that the judgment in the action to foreclose the mortgage was conclusive upon the defendant as to the title of Brown. The court, as to each offer, held the objection well taken, and the defendant excepted. The court directed a verdict for the plaintiff, and the defendant excepted. The exceptions were ordered to be heard in the first instance at a general term.

P. G. Parker, for the plaintiff.

H. Boies, for the defendant.

By the Court, MARVIN, J. In *Eagle Fire Company* v. *Lent*, (6 *Paige*, 635,) Chancellor Walworth said: "So far as mere legal rights are concerned, upon a bill of foreclosure the only proper parties to the suit are the mortgagor and the

mortgagee, and those who have acquired rights or interests under them subsequent to the mortgage. And the mortgagee has no right to make one who claims adversely to the title of the mortgagor, and prior to the mortgage, a party defendant, for the purpose of trying the validity of his adverse claim of title in this court."

This principle was applied by the court of appeals in *Corning* v. *Smith*, (2 *Seld.* 82.) In these cases the question arose in the action to foreclose a mortgage. In the last of these cases it is held that the court should look into the question far enough to ascertain whether it comes within the rule, and if so, it should dismiss the complaint as to such defendant.

In *Lewis* v. *Smith*, (5 *Seld.* 502,) it was held that a claim of dower was not barred by a foreclosure of a mortgage executed by the husband during coverture, though the widow was made a party to the foreclosure suit, and the bill was taken as confessed against her. The complaint contained the averment that she claimed some interest in the premises as subsequent purchaser or incumbrancer, or otherwise.

After reading these cases I am satisfied the court erred in holding that the judgment and sale in the mortgage foreclosure was conclusive upon the defendant as to the title of Brown. Such judgment had no effect upon any claim of title by the defendant arising prior to the mortgage. And it appears from the case just cited that had the defendant suffered the complaint to be taken as confessed, the judgment would not have affected any legal claim he had, arising anterior to the lien of the mortgage. It is intimated in *Lewis* v. *Smith* that if the party appear and litigate the question of his claim and is defeated upon it, the judgment in the foreclosure action will conclude him, in a collateral action. I have no doubt this would be so.

In the present case the defendant Parker appeared in the foreclosure action and answered, setting up, as one of his defenses, that Brown the mortgagor was not the owner, or

seised of the premises, at the time he executed the mortgage, but that he, Parker, was owner and in possession of the premises, and so continued ever since.

This claim of the defendant was not tried before the referee. The parties stipulated that a judgment might be taken, containing a provision that it was without prejudice to any adverse title in the defendant Parker, to the mortgaged premises, superior to the mortgage. It was intended by this stipulation to save to Parker any right he had to the premises, existing prior to the mortgage lien. He was in possession when Brown gave the mortgage, claiming title to the premises, and it was intended by this stipulation that the judgment should have no effect upon any rights he had at the time the mortgage was given; and this intention was effected by the clause in the judgment, that it was without prejudice to any adverse title in Parker, &c. &c.

It may also be well to refer to the statute making grants of land held under a title adverse to that of the grantor void, but allowing a mortgage to be executed which "shall bind the land from the time the possession thereof shall be recovered, by the mortgagor, or his representatives." (1 *R. S.* 739.) The remedy here indicated is an action to recover the possession of the premises held adversely at the time the mortgage was executed.

Issues joined in actions for the recovery of the possession of real estate must be tried by a jury. (*Code*, § 253.)

In this case the defendant Parker should be allowed to make any defense which existed prior to the execution of the mortgage.

There must be a new trial; costs to abide the event.

[Erie General Term, May 2, 1865. *Grover*, *Daniels* and *Marvin*, Justices.

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ROACH *vs.* LAFARGE.

The filing of a supplemental complaint for the purpose of reviving an action is a matter of right. A motion for leave to file such a complaint is unnecessary and improper.

THIS was a motion made at a special term by the plaintiff, for leave to file a supplemental complaint for the purpose of reviving the action. The motion was denied, at special term, and an appeal taken from the order entered on such denial.

GEO. G. BARNARD, J. In the *Matter of Borsdorff*, (17 *Abb. Pr. Rep.* 168,) the general term of this district decided that the filing of a supplemental complaint for this purpose was a matter of right; and that a motion for leave to file such complaint was unneccessary and improper. I think the decision in the *Borsdorff* case was correct, and see no reason for departing from it; the filing of a suplemental complaint by the plaintiff, for the purpose of reviving an action, being a matter of right.

The order should be affirmed, on the ground that the motion was unnecessary and improper.

LEONARD P. J. The code, § 121, has introduced a form unknown to the practice of the late court of chancery, and applied it for the purpose of reviving an action after the party entitled to revive has omitted for a year to proceed in a more simple manner for that purpose by motion. The office of a supplemental bill in chancery was, generally, to introduce new facts, which had arisen since the bringing of the original bill; and leave to file the supplemental bill must be obtained from the court. "If there is probable cause for filing it, leave will be given of course, and the court only examines the question so far as to see that the privilege is not abused for the purpose of delay and vexation to the defendant; and

in a case of doubt, the court will direct notice of the application to be given." (1 *Hoffman's Ch. Pr.* 403.)

The same author says the practice is most safe to apply for leave, in all cases.

If the application to revive be made within a year, the formality of a supplemental complaint is unnecessary; but the leave of the court must be obtained by a motion.

It is true, the code does not direct an application to the court for leave to bring the supplemental complaint after the expiration of a year from the time of the death or other disability of a party, but such was the former practice in respect to supplemental bills, and I do not see how or where it was abrogated. Had the code directed the action to be continued by a bill of revivor, then the former practice in relation to such bills would have been impliedly adopted, and I concede that the practice of bringing it without application for leave would have been regular.

The proceedings by bill of revivor, and supplemental bill, were each well known to the practice in the court of chancery; and when the "supplemental complaint" was introduced into the code, it seems appropriate that the practice prevailing at the introduction of the code in relation to that proceeding should be adopted.

I am unable to percieve any good reason why the leave to file the supplemental complaint should not be granted.

The motion was denied at special term only for the purpose of enabling the question to be brought before the general term by appeal.

Since the decision in the *Matter of Borsdorff* v. *Lord*, (17 *Abb. Pr. Rep.* 168; *S. C.* 41 *Barb.* 211,) we must, until some other practice is adopted by more united authority, adhere to the rule there prescribed. The plaintiff, in the present case, will serve his supplemental complaint for the purpose of continuing his action, if so advised, although the leave to do so is denied.

I think the order should be affirmed without costs.

SUTHERLAND, J. concurred in affirming the order without costs.

Order affirmed, without costs, on the gound that a motion was unnecessary and improper.

[NEW YORK GENERAL TERM, November 7, 1864. *Leonard, Geo. G. Barnard* and *Sutherland* Justices.

FREEMAN *vs.* SCHROEDER and others.

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62h 104

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Where there are several mortgages upon the same premises, the one first recorded is presumptively the prior lien, and entitled to the surplus moneys on a foreclosure and sale.

The burden is upon the holder of the junior mortgage, to overcome this presumption of law.

The date of the acknowledgment is not, standing by itself, evidence of a delivery of the mortgage; nor is even the record conclusive evidence of a delivery.

The presumption of priority between mortgages, arising from the record, may be overcome by proof that the mortgage first recorded was, by verbal agreement between the mortgagor and mortgagee, not to become operative until the whole consideration was paid, and that the second mortgage was delivered and recorded before such payment.

An agreement between a mortgagee and the mortgagor, that the mortgage shall be second in order, as a lien, to another mortgage on the same premises, is valid between the parties, if made prior to the delivery of the mortgage; and the assignee of such second mortgage will have no greater right than his assignor possessed, to disturb the lien of the prior mortgage.

APPEAL from an order made at a special term, settling the rights and priorities of the several claimants to surplus moneys arising from the sale of mortgaged premises, under a judgment of foreclosure. There were two mortgages executed by John R. Schroeder upon the same premises; one given to Ross, under which Mallory claimed, which was recorded June 8th, 1861; and one to Stevens, under which Freeman, the plaintiff, claimed which was recorded two days

later. The time of the actual delivery of neither of these mortgages was proven. The court decided that Mallory was entitled to a priority in payment out of the suplus moneys, and Freeman appealed.

A. J. Vanderpoel and *S. B. Brownell*, for the appellant.

Paddock & Cannon, for the respondents.

LEONARD, P. J. The mortgage first recorded is presumptively the prior lien, and entitled to the surplus in question. The burden is, therefore, upon the holder of the junior mortgage to overcome this presumption of law.

The date of the acknowledgment is not, standing by itself, evidence of a delivery of the mortgage. The record is evidence of delivery in a greater degree, because the instrument is not then in the possession of the mortgagor; but even the record is not conclusive evidence of a delivery. The mortgage may have been recorded conditionally, to become operative, perhaps, when the consideration has been received by the mortgagor, as often occurs in practice. A verbal agreement between the mortgagor and the mortgagee, in respect to the time when the mortgage shall become operative, is valid notwithstanding the record.

In the present case, the sum of $6000, part of the consideration of the mortgage under which Mallory claims, was had by the mortgagor long before the execution of the mortgage, but it is uncertain whether the sum of $2000, the residue of the consideration of that mortgage, was advanced until some time duing the 10th day of October, 1861, upon which day the mortgage under which Freeman claims was recorded. This latter sum may have been paid, or the check for it delivered to the mortgagor, before that day, but it is not certain that it was so. But if the proof is put in the most favorable light for Freemen's claim, the mortgage of

Mallory became operative for its whole amount on the same day that the mortgage held by Freeman was recorded.

It was necessary then for Freeman to show only that his mortgage had been delivered prior to the payment of the sum of $2000, to cause it to become, in the absence of other proof on the part of Mallory, to that extent entitled to a priority in the order of payment. The mortgage of Freeman was given to secure an antecedent debt, and the instrument became operative instantly upon an unconditional delivery. But Freeman has failed to show any delivery of the mortgage under which he claims, prior to the delivery of the check for $2000, which made up the remaining consideration of the mortgage held by Mallory.

Ross was not affected by the lien of the mortgage to Stevens, so as to prevent him from advancing the $2000, until he had notice of its existence, either constructively by the record, or by actual knowledge of its delivery. There is no evidence that Ross had any notice of the mortgage to Stevens when he advanced the $2000, either actual or constructive, even if we assume that the mortgage had in fact been delivered, as to which we are without evidence.

It also appears in evidence that it was agreed between Stevens and the mortgagor that the mortgage to Stevens, under which Freeman claims, should be second in order, as a lien, to the mortgage to Ross, under which Mallory claims.

This agreement was valid between the parties because made prior to the delivery of the mortgage, and while the mortgagor had the right, as well as the means, of fixing a condition to the delivery and the order of priority between the liens about to be created. The record was evidence of the priority of the Mallory mortgage when Freeman acquired the mortgage under which he claims. He has no equity to disturb the prior lien of the mortgage held by Mallory greater than that of his assignor, Stevens.

The time of the record, as well as the agreement referred to, strengthen the claim under the mortgage by Mallory.

The admission of the evidence respecting the statements made by Stevens, the former owner of the mortgage now held by Freeman, was an error. The subsequent purchase of chattels is not affected by the oral declarations of the prior owner, unless they have been brought to his knowledge before he became the purchaser. The error does not, however, help the case of Freeman, as his proof fails to establish a prior claim, without reference to the evidence improperly admitted against his objection.

The order appealed from should be affirmed, with $10 costs.

BARNARD, J. I concur, upon the ground that it was agreed between Beebe and Stevens at the time the mortgage was given to Stevens, that such mortgage should be subsequent to the mortgage given to Ross for $7000. The testimony of Ross as to the statements made by Stevens was clearly improper. But as there is no evidence whatever, tending to contradict the testimony given by Bebee as to the agreement made by him with Stevens, I think the evidence as to the statements made by Stevens may be considered as harmless evidence, and that the error in admitting it, may be disregarded on this appeal.

SUTHERLAND, J. also concurred.

[NEW YORK GENERAL TERM, November 7, 1864. *Leonard, Geo. G. Barnard* and *Sutherland*, Justices.]

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4h 170
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SAWYER and others *vs.* CHAMBERS and others.

In an action upon a promissory note, by the payees against indorsers, the court refused to allow the defendants to show that the note was given for goods to be delivered, and that such goods had never been delivered. *Held* erroneous.

The rule that exceptions to a charge must be specific does not apply to a case where the judge excludes the defense on the opening of the defendant's counsel.

Where the judge excludes the whole defense, one exception to the decision is good.

ACTION upon a promissory note, against the indorsers. Upon the trial the plaintiff proved the execution of the note and the interest, and rested. The defendants opened their defense, and being requested by the plaintiffs' counsel, stated that they intended to prove that the note in suit was indorsed by the defendants for the Gutta Percha Company themselves, upon the condition that the plaintiffs would perform and carry out an agreement made between them and the company to deliver to the company cotton duck, at a certain price, for which the company was to give satisfactory paper. That the plaintiffs did not perform their agreement, and thereby prevented the company from paying the note. That the contract was the sole consideration for the note in suit. That the note was given for cotton duck so sold and to be sold to the company; that only duck to the value of $3195.19 had been delivered, and that the company had paid the plaintiffs, on account of the duck so delivered, a sum of money exceeding the contract price thereof.

The court refused to permit the defendants to prove such matters, and directed a verdict for the plaintiffs, to which ruling the defendants excepted.

Mr. Abbott, for the appellants.

Mr. Harrington, for the respondents.

By the Court, INGRAHAM, J. The defense set up in this case must be considered as sufficiently alleged in the answer, as the answer was amended by the court to embrace the facts so stated

Whether this is to be considered an offer to show a total or partial failure of consideration between the plaintiffs and the makers, is immaterial. Between the original parties such a defense is admissible. The offer was to show that the whole consideration of the note, or the greater part of it, had failed; that the note was given on account of the goods, which the plaintiffs had agreed to sell to the company; that only a small portion of such goods had been delivered, and that the amounts so delivered had been actually paid for. I am at a loss to see any ground on which this evidence could be excluded.

Surely an accommodation indorser is in no worse condition than the maker. He has a right to any defense which the maker could avail himself of. If the makers had been sued upon the note, they could have shown that the note was given on account of goods to be delivered, and that such goods had never been received. The plaintiffs, under such proof, would have no claim against the defendants, as the note would be without consideration. So long as the courts permit the consideration of a note to be inquired into under any circumstances, the facts presented in the defendants' offer must come within such a rule. The plaintiffs have no right to recover on this note, from any of the parties, any thing more than enough to indemnify them for the duck sold or thereafter delivered to the company, and the defense that no such amount of duck had ever been delivered should not have been excluded.

The plaintiffs' counsel has urged to us that a partial failure of consideration can not be given in evidence to defeat a recovery against a note. (17 *N. Y. Rep.* 101. *Id.* 230, *and other cases.*) Both of these cases were on notes held by *bona fide* holders, to whom the same had been transferred, after the contract was made, and who had no knowledge thereof.

I know of no such rule as applicable to the original parties, unless the strict rule is applied which prevents the admission of parol evidence to vary written contracts. This rule has not been applied to proof of the consideration of a promissory note.

Another objection of the plaintiffs is that the exception is too general, and although part of his offer was good, still he excepted to the conclusion of the court upon the whole defense, instead of making specific exceptions. All the cases cited by the plaintiff in support of this point were cases of exceptions to the whole of the judge's charge. But that is not this case. The defendant opened his defense to the jury, and the judge ruled that he had no defense, to which the defendant excepted. There was but one question, viz. whether in the matters stated the defendant had stated a defense. If he had, the judge erred in excluding it. It was not necessary for the defendants' counsel to repeat the statements again and to take a separate ruling on each. The probability is that, separately, each of the propositions might have been insufficient, and that it was only by grouping them together that the defense could be made out. The purpose for which the note was given, the non-payment of the consideration either in property or money, the failure to perform by delivering the goods, and knowledge on the part of the holders, were all necessary to be shown to make out the defense, and all the matters offered were necessary for that purpose. But whether so or not, the rule relied on by the plaintiffs' counsel does not apply to a case where the judge excludes the defense on the opening of the counsel. Then the question is, whether in what is offered there is any defense; and if the judge excludes the whole defense, one exception thereto is good.

Judgment should be reversed and a new trial ordered, costs to abide the event.

[New York General Term, November 7, 1864. *Ingraham, Geo. G. Barnard* and *Sutherland*, Justices.]

THE AMERICAN SEAMAN'S FRIEND SOCIETY and others, *appellants*, *vs.* HESTER HOPPER and others, *respondents*.

Evidence held sufficient to warrant the setting aside of a will on the ground of mental delusion in the testator, in respect to the natural objects of his bounty.

APPEAL from a decree of the surrogate of the county of New York, declaring an instrument propounded as the last will and testament of Charles Hopper, deceased, to be invalid on the ground of his want of mental capacity.

B. J. Blankman, for the appellants.

J. T. Brady and *B. Galbraith*, for the respondents.

LEONARD, J. The surrogate has found against the validity of the will of Charles Hopper, deceased, on the ground of his want of mental competence.

Had the testator made a natural or usual disposition of his property, his mental capacity would not have been questioned. But the will in this case, disregarding external facts and circumstances narrated by the witnesses, was unnatural, and, in part, against the express provisions of an act of the legislature of this state. (*Sess. L.* 1860, *chap.* 360, *p.* 607.)

The monomania, or mental delusion of the testator, if any existed, related directly to the subject of the devise of his property to certain persons who were his relatives, and to whom, up to a short period before his death, he had declared it to be his intention to give his property.

His mind was sufficient for the purpose of making a will, unless it was warped or deluded in respect to the natural objects of his bounty.

If we except the apprehensions and convictions of the testator, or those which he professed to entertain in respect to the intentions and acts of his nephews towards him, it will be impossible to discern, from anything which he said or did,

the want of mind or memory sufficient to make a valid disposition of his estate by will.

The change in his testamentary intentions appears to have been caused in the first instance by his nephews having taken part against him and in favor of his wife in an action brought by her for a divorce and alimony, on the ground of his cruel treatment, which action was finally prosecuted to judgment against him. The opinion of the testator in regard to the actual conduct of his nephews in this respect was well grounded. They were witnesses against him, and the advisers of his wife, and took decided ground against their uncle during this unhappy controversy, impelled, no doubt, by a sense of justice and truth. Here was no delusion by the testator. However unjust his anger against his nephews for this cause, it raises no foundation for the suspicion of mental incompetency.

One of the nephews sometimes indulged in offensive language to his face, and the other in offensive language which was reported to the testator by tale bearers, and contributed to exasperate an irritable state of mind.

For two or three years preceding the date of his will, the testator expressed the belief that his nephews were conspiring to take his life; and finally, that one of them caused his death by putting him upon a hot stove.

My conclusion, from the evidence on this subject, is that the testator was under a mental delusion in this respect.

The testimony would not warrant the submission of the case to a jury, if the testator were living and had brought an action for an assault and battery against his nephew for throwing him on the stove, and thereby causing him an injury.

There is no evidence to warrant the belief by the testator that his nephews intended to administer poison or chloroform to him, or to cause him to be thrown overboard on a fishing excursion, or that they had conspired to attempt his life in any manner.

If these delusions stood alone, I should hesitate to act upon them, by holding the will invalid. But there were other delusions of a grave nature. The testator conceived that there was a building in Broadway with the sign of a human eye; that his wife, although far advanced in years as well as himself, was guilty of conjugal infidelity—improbable not only as respects his wife, but also in respect to the venerable gentleman with whom he supposed that she practiced her amours.

It appears most probable that this latter delusion would have prevented any testamentary provision in favor of his wife, had not the testator been advised by legal counsel that such omission would endanger the validity of his will.

The aversion to his nephews was so great that he was easily influenced to make an ample bequest to his wife, in addition to dower, to avoid the danger of any of his estate eventually benefiting them. A similar motive has induced him to omit to make any provision by his will for the benefit of his sister.

Had the surrogate sustained the will, in disregard of the evidence of such mental aberrations, directly affecting the intentions of the testator, so distinctly expressed before the development of these delusions, I could not have concurred in his conclusion. His decision on this question is now in conformity with my own views, and I have no reason for reversing it or sending the question to a jury. I do not in the least doubt that the verdict of a jury would produce the same result, but I do not esteem it necessary to subject the case to that test. The question of undue influence was not pressed at the argument, nor was it considered of any weight by the surrogate, and appears really to have no foundation in fact.

I am for affirming the judgment of the surrogate, with costs.

Geo. G. Barnard, J. concurred.

SUTHERLAND, J. (dissenting.) I have examined the immense mass of evidence in this case with great care.

The will of Charles Hopper appears to have been formally executed and witnessed in the manner required by the statute. The sole question is as to the competency (mental capacity) of Charles Hopper to make a will, at the time the will was executed. This is not a question of law, but is a question of fact; and considering that the evidence presented by the case on this question is very conflicting, I think it a peculiarly proper case for awarding, under the statute (3 *Rev. Stat. 5th ed.* 151, § 73) a feigned issue to try the question of competency.

Decree affirmed.

[NEW YORK GENERAL TERM, November 7, 1864. *Leonard, Geo. G. Barnard* and *Sutherland*, Justices.]

BARTH *vs.* BURT.

Although a purchaser, when sued for the price of goods sold, may set up a breach of warranty as a defense by way of recoupment, or counter-claim, yet he is not bound to do so, or be precluded from any claim or action in respect to it.

He may, after the recovery of a judgment against him, for the price of the goods, bring an action against the vendor for breach of warranty.

THIS case came up on exceptions taken at the trial, and there directed by the justice to be heard at the general term in the first instance.

The action was brought to recover for a breach of warranty as to the quality of hogs sold by the defendant to the plaintiff. The defendant put in issue every allegation of the complaint, but no new matter of defense was interposed by the answer. At the trial the defendant was permitted to introduce in evidence the record of a judgment in this court in favor

of the defendant, Burt, against Barth, the plaintiff in this action for $300, being the balance due to Burt on a sale of 160 hogs by him to Barth. This judgment was recovered by default for want of an answer, and the damages were assessed by the clerk of Wyoming county, where the venue was laid. No question was made on behalf of Barth at the trial of the present action, that the recovery of the said judgment was not had for the same hogs as to which the breach of warranty is here alleged, and no objection was made to the admission in evidence of the record of the former judgment.

The plaintiff offered to prove the truth of every allegation contained in his complaint in this action, but the learned justice excluded the evidence and dismissed the complaint, to which ruling the plaintiff duly excepted.

LEONARD, J. It is insisted on the part of the defendant Burt, in this action, that the recovery of the judgment against Barth, in the former action, is a bar to the present action, and that Barth was required by law to interpose the breach of the alleged warranty as a defense, recoupment or counter-claim in that action, or be precluded from any claim or action in relation to it; that the record of the former recovery estops the defendant in that action (Barth) from controverting that the plaintiff therein (Burt) fully performed his contract; that matter which would have been a defense to a former action can not be made the subject of a subsequent suit.

There is no doubt that Barth might have interposed the breach of warranty as a defense to the action of Burt, as a recoupment or counter-claim, but the question here is, was it necessary for him to do so, or be forever precluded from a recovery for his alleged damages for the breach of warranty? The examination which I have given to this subject leads me to the conclusion that this inquiry must be answered in the negative.

I will shortly refer to some of the cases most relied on by the learned counsel for the defendant to establish the rule adopted at the trial of this action.

The case of *Davis* v. *Talcott* (12 *N. Y. Rep.* 2 *Kern.* 184) decides that, where the non-performance of an agreement is interposed as a defense to an action, and it so appears from the record, the defendant in that action can not maintain an action subsequently for the breach of the same agreement. That case also decides that where the facts constituting a non-performance of an agreement are set up as a ground for a recoupment or set-off, and it so appears from the judgment record in the former action, parol evidence is inadmissible in a subsequent action, brought by the defendant in the first action, to recover for the non-performance of the same agreement, to establish that the recoupment was withdrawn at the trial in the former action, and the evidence of non-performance confined to resisting are covery in the former action. The record in the former action established by higher evidence a different state of facts from those proposed to be proved by parol in the second action, and tended also to impeach the verity of the record.

The case of *Morris* v. *Floyd* (5 *Barb.* 130) was decided on the same principle. There it appeared that a mortgagor had been sued on his bond and interposed a defense by plea, but afterwards suffered judgment to be recovered against him by default at the circuit, where an inquest was taken. In a subsequent action to foreclose the mortgage, the mortgagor set up the same defense. The court held the former judgment to be final. "It is enough that he had an opportunity of trying the question, and that the matter has been adjudged against him."

In *Norton* v. *Woods*, (22 *Wend.* 520,) it is decided that where a party neglects to avail himself of his defense at law, he can not afterwards obtain relief in equity on the same facts which he might have set up as a defense at law. That

is all there decided which has any bearing upon the case before us.

The case of *Canfield* v. *Monger*, (12 *John.* 347,) arose in a justice's court, and came before the late supreme court, on *certiorari*. The remark of the court in that case had reference to the statute then in force relating to sets-off in a justice's court, making it necessary for the defendant in an action to plead his set-off, if he had one, or be forever precluded from maintaining an action to recover it. The case has no application here.

In *McAllister* v. *Reab*, (4 *Wend.* 482,) affirmed in the court of errors, (8 *id.* 109,) the judge at the trial excluded evidence offered under a plea of a breach of warranty on the sale of an article for the price of which the plaintiff sought to recover. This was held to be an error. Justice Marcy, delivering the opinion of the court, uses this language, viz: "A second litigation of the same matter should not be tolerated where a fair opportunity can be afforded by the first to do final and complete justice to the parties," &c. This language is cited by the defendant's counsel, and is to be found on his points as authority to sustain the affirmative of the question above propounded. It is appropriate language in a case where the defense has been pleaded, but has no application in the case before us, where no plea or answer was interposed in the former action. These cases are all distinguished from the present.

Other cases are cited by the defendant's counsel, which hold that so far as the subject matter in controversy has been adjudicated upon, the parties are concluded by it. Also, that a judgment of a court of competent jurisdiction is final as to every matter which the parties might have litigated in the cause. A reference to those cases will show that the "matter in controversy" had been put at issue by the pleadings or the situation of the question or proceedings before the court, and that they have no application to a case where the "matter in controversy" was not before the court so as to

entitle the defendant to offer evidence of a matter of recoupment, set-off, or counter-claim. A former judgment is a bar, not to all claims that might have been litigated therein, but only to such claims or matters as might have been litigated under the pleadings and issues as made. (*Burdick* v. *Post*, 12 *Barb.* 168.)

I think it entirely clear, upon authority, that the defendant has the election whether he will set up his claim in answer to the plaintiff's demand, or resort to a cross-action. Such is declared to be the rule by Judge Bronson, in *Batterman* v. *Pierce*, (3 *Hill*, 171.) In that case the warranty was set up as a defense to an action on a promissory note, and the evidence to support it was excluded. The facts of that case are, therefore, not strictly analogous to the one now under consideration, but the dicta of so eminent a jurist is not without force as legal authority.

The New York superior court compelled the defendant to elect between an action which he had previously brought for damages for the breach of a contract, and a claim to recoup in an action against him to recover on a promissory note given for the price of marble sold under the contract in question. (*Fabbricotti* v. *Launitz*, 3 *Sandf.* 743.)

The same court also held that the defendant had the right to elect whether he would recoup or set-off his damages, or bring a separate action. That such had always been the rule, and the code had not effected any change in that respect. (*Halsey* v. *Carter*, 1 *Duer*, 667.) To the same purport is also the case of *Lignot* v. *Redding*, (4 *E. D. Smith*, 285,)—opinion by Ingraham, first judge.

The cases referred to sufficiently show that the right of the plaintiff to recover in this action has not been barred by the recovery in the former action of the defendant.

There must be a new trial, with costs to abide the event.

SUTHERLAND, J. When a defendant, before the code, set up a counter-claim by way of recoupment, he could not have

a balance certified in his favor ; and as there might be cases in which the damages he had sustained by fraud or breach of warranty in the purchase of goods, exceeded the plaintiff's claim for their price, if the courts had denied the defendant the election either to recoup or to bring a cross-action for such damages, the defendant in such case would have been without any remedy for such balance or excess of damages beyond the plaintiff's claim ; for to have allowed the defendant to recoup to the extent of the plaintiff's claim, and then to bring an action for such balance, would have interfered with the decisions holding that parties can not split up their claims.

I do not think, therefore, that the cases referred to, in which it is said that the defendant had his election, either to recoup or bring an action, should be considered as controlling on the question in this case.

But prior to the code, under the statutes allowing a set-off, and under the code allowing a counter-claim, the defendant can have judgment for any balance found in his favor ; and yet I find no case holding that under the statutes of set-off the defendant was bound, in an action in a court of record, to plead or give notice of his set-off, or be precluded from bringing an action. In the absence of any such decision, I concur in the conclusion to which Justice Leonard has arrived, in this case. (*See, also, Halsey* v. *Carter*, 1 *Duer*, 667 ; *Welch* v. *Hazelton*, 14 *How. Pr. Rep.* 97.)

The estoppel in *Davis* v. *Talcott*, (12 *N. Y. Rep.* 184,) appears to have been put on the ground that the recovery of the plaintiff in the former action, from the *nature of the agreement upon which that action was brought*, involved the consideration of the claim on which the second action was brought, irrespective of the fact that the claim was set up as a counter-claim in the first action. I do not think this principle of estoppel applicable to the principal case.

Whether a defendant, after properly setting up in his answer a counter-claim, can afterwards, and during the pen-

dency of the action in which he has set it up, and in which it may be allowed, bring an action on the claim thus set up as a counter-claim, is another question, and one on which I have expressed an opinion in another case, decided at this term.

There should be a new trial.

CLERKE, J. concurred.

New trial granted.

[NEW YORK GENERAL TERM, February 1, 1865. *Leonard, Clerke* and *Sutherland*, Justices.]

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A. and E. SCHEITLIN *vs.* STONE and others.

A sale by an insolvent debtor of his whole stock in trade, upon credit, is not necessarily fraudulent against creditors.

THIS action was brought by the plaintiffs as judgment creditors of the defendants, Edward Stone, William F. Kortright and James C. Littlewood, composing the firm of E. Stone & Co., after execution returned unsatisfied, to set aside a sale and transfer of the stock in trade of the firm to the other defendants, Edward F. Stone and John M. Hall, as being made to hinder, delay and defraud creditors.

The complaint charged that previous to the pretended sale the firm had failed, and suspended payments, and declared themselves to be insolvent, and were in fact insolvent at the time of the sale; that the stock was sold for $12,000, for which the firm agreed to take the six notes of E. F. Stone & Hall, payable at six, nine, twelve, fifteen, eighteen and twenty-one months, respectively; that the sale was made to prevent the property from being seized under executions by their creditors; and that, at the time of the sale, E. F. Stone

& Hall knew that the firm had suspended payment, and were insolvent, and that they knew, or had reason to know, that the sale was made with the intent and purpose of preventing the property from being seized by the creditors of the firm. The complaint also alleged various other facts and circumstances to show that the sale was fraudulent as to creditors.

The defendants, E. F. Stone & Hall, in their answer, admit the sale for the notes, but insist that it was *bona fide*, and made in good faith, and they allege that they agreed to pay more for the stock than it was worth, as the good will was included in the sale, and that the firm turned out the notes which they received to their creditors, and that they (E. F. Stone & Hall) have paid the notes as they matured, and that by the sale the firm had received a larger sum for the merchandise than they otherwise could. E. F. Stone & Hall also deny that they knew that the firm was insolvent, and they deny that they knew, or had reason to know, that the sale was made to prevent the property being seized by the creditors of the firm.

The defendants, Edward Stone, Kortright & Littlewood, composing the firm, in their answer, deny that they declared themselves to be insolvent or unable to pay their debts, but do not deny that they were in fact insolvent. They insist that the sale was a *bona fide* transaction, and not made for the purpose, or with the fraudulent intent, charged in the complaint, and that they received by the sale more for the property than it was worth, and more than they could or would have received from any other disposition of it. The concluding paragraph of their answer is in these words: "And these defendants, further answering said complaint, say, that at the time of said sale of said merchandise, alleged in said complaint, they were embarassed in their financial affairs, and were unable to meet their liabilities as they became due and payable, and were obliged to ask their creditors

for an extension, but these defendants did not consider or believe that they were insolvent. They owed confidential debts which it was their duty to pay in preference to others, and said sale was made in order that said property should not be sacrificed, and that the confidential creditors of said E. Stone & Co. should get the avails of said merchandise, and for no other purpose; and these defendants aver that the confidential creditors of E. Stone & Co. received the avails of said sale of said merchandise; that the notes of said Stone & Hall were immediately turned out as security to the confidential creditors of E. Stone & Co. and that said notes have been paid by said Edward F. Stone and John M. Hall, as they have matured, to the creditors of the said E. Stone & Co.

On the trial at special term a large amount of evidence was given on the part of the plaintiffs, to show that the sale was fraudulent.

The justice who tried the cause found as a fact, that the plaintiffs recovered the judgment alleged in the complaint for the indebtedness and the amount and at the time alleged in the complaint, and that executions were issued and returned unsatisfied, as alleged in the complaint. He further found as a fact, that the firm of E. Stone & Co. sold the stock of goods in the complaint alleged to the other defendants, Stone & Hall, at the time and for the prices therein alleged, and upon the credit therein specified, and that the sale was made in good faith, and for a good and valid consideration. He also found that the sale was not made to hinder, delay or defraud creditors, and ordered judgment for the defendants, dismissing the complaint with costs.

From the judgment, entered in pursuance of this order, the plaintiffs appealed.

Henry Nicoll, for the appellants.

Mr. ———, for the respondents.

INGRAHAM, P. J. I see nothing in the transaction in this case, upon the contract as made between the parties, which will warrant us in setting aside the sale.

The purchasers deny all knowledge of a fraudulent intent; they show that the sale, as made, was the best mode of getting the highest price for the property sold, and that the notes, when sold, were paid to the creditors, and have all been paid by the makers. I know of no principle of law that prevents a party who is involved in debt from selling his property, nor from making such sale on credit, nor from taking the notes received for his goods and paying his creditors with them. If a creditor chooses to receive a note in payment of his claim, he is not hindered or delayed in its collection. His debt is paid as soon as he receives the note in payment. Nor can I see any wrong in selling on credit, if thereby the debtor is able to pay two debts, when, by sale for cash, he would only be able to pay one creditor.

The justice who tried the case found that the sale was made in good faith and for a good consideration, and was not made to hinder creditors or defraud them. Under such findings it was impossible to hold the sale void. Until the courts go so far as to hold that all sales made by a debtor in failing circumstances are void, I can see no reason for so holding in this case; and when such a rule is adopted, it will render it necessary for every purchaser of goods, before he makes a purchase, to institute an inquiry into the solvency of the vendor. If a man who purchases without notice, for a good consideration and without any intent to hinder or defraud creditors, can not be protected by the law, there will be no safety in commercial transactions. The statements in the answer of the firm who sold the goods are not evidence against the purchasers in whose favor the judge found on the trial, even if they admitted a fraudulent intent on their part. The purchasers had no such intent, and knew nothing of any fraudulent transaction.

As to the findings of fact by the judge, I think they were

warranted by the evidence, and I concur with him in the conclusions to which he arrived.

I think the judgment should be affirmed.

CLERKE, J. concurred.

SUTHERLAND, J. (dissenting.) It is impossible to sustain the transaction, even on the answers.

The statute declares void every conveyance, &c. "made with the intent to hinder, delay or defraud creditors," &c. The necessary effect or result of the transaction, as avowed in the answers, was to hinder and delay creditors. The parties must be presumed to have intended the necessary effect or result of the transaction. Even the favored creditors, to whom the notes were turned out, were obliged to take the notes and wait until they matured, or get nothing. Take the statement of the transaction in the answer of the defendants composing the firm, and it can not be supported without evading the statute. They say that the sale was made to prevent the property from being sacrificed, and that the confidential creditors should get the avails; but, as I have said, even the confidential creditors could not get the avails until the notes matured, and the necessary effect was to hinder and delay even them. It is quite immaterial how good or pure in a moral aspect the motives of the defendants may have been.

The giving of the notes did not make E. F. Stone & Hall purchasers for value. When this action was commenced, by their own answer they were not purchasers for value, except to the extent that they may have actually paid their notes.

Without examining the evidence on the question of fraud in fact, or other questions in the case, I think, then, that the judgment should be reversed, and a new trial ordered, with costs to abide the event.

Judgment affirmed.

[NEW YORK GENERAL TERM, February 1, 1865. *Ingraham, Clerke* and *Sutherland*, Justices.]

The President of the Troy City Bank *vs.* Bowman and others

Where the complaint in a foreclosure suit set out the indebtedness of the mortgagors upon notes indorsed by them and discounted by the plaintiff; and alleged that the mortgage was given to secure the payment of a bond by which the time for the payment of such indebtedness was considerably extended; and that the obligors had failed to comply with the conditions of the bond; *Held*, that these facts constituted a sufficient cause of action.

A bond is not void for uncertainty, if it can be made certain by extrinsic facts.

A bond, conditioned for the payment of a specified sum, or so much of said sum as shall remain unpaid on certain notes indorsed by the obligors and held by the obligees, after the application to the payment thereof of all net moneys received from the makers, or the collaterals accompanying the same, is not void for uncertainty.

APPEAL from a judgment of foreclosure. The defendant Samuel S. Bowman put in an answer denying all the allegations of the complaint except as afterwards admitted. And for a further and separate defense, he averred that the plaintiff, at the time it required and demanded from him the bond and mortgage set out in the complaint, in order to induce him to make and execute the same, made and delivered to the defendant a certain agreement in writing, whereby the plaintiff stated truly certain notes of one Morris L. Samuel & Co. indorsed by Samuel S. Bowman & Co. which it then claimed to hold, and also certain promissory notes which it held as collateral thereto, and whereby, for a good and valuble consideration, the plaintiff agreed: That the said bond and mortgage should be security for such deficiency only as might remain due after the credit of all moneys that might be collected upon said notes and collaterals; and whereby it also agreed to collect said notes and collaterals, and that in the meantime and until such collections should be fully made, no suit should be brought against said defendants, Bowman or Finn, or either of them, for the foreclosure of said bond and mortgage. And the defendant averred that the mortgagors made and delivered said bond and mortgage solely in reliance

upon said agreement of the plaintiff, and as an ultimate security after the exhaustion and application upon the principal debts of all the other collaterals thereto. That the plaintiff had, in pursuance of said agreement and in part performance thereof, undertaken to collect certain of said notes, and that actions thereupon are now pending, secured upon appeal, and have not been determined, and that the plaintiff had neglected and refused to collect certain other of said notes. And the defendant averred that the plaintiff had not duly performed all or any of the conditions precedent on its part in the contract with the defendant, and that the plaintiff had no cause of action against the defendants, or right to proceed to foreclose said bond and mortgage. Wherefore the defendant demanded judgment in favor of the defendants and for the costs of this action.

The bond executed at the same time with the mortgage, and collateral thereto, was conditioned for the payment of $7317.14, "or so much of said sum as shall remain unpaid on the notes of Morris L. Samuel & Co. indorsed by Samuel S. Bowman & Co., after the application to the payment thereof of all the net moneys received from the makers of said notes, or the collaterals accompanying the same, as follows, namely: One third in twenty-four months, one third in twenty-seven months, and one third in thirty months, together with the interest on the amount due, at the rate of seven per cent per annum, payable semi-annually."

The plaintiff gave to Bowman a receipt for the mortgage in suit, which specified the notes of third persons held as collateral, and contained this clause: "And upon the receipt of said money the same is to be credited upon said notes and bond and mortgage, and the said Samuel S. Bowman and Felix A. Finn are to be held responsible only for the deficiency on the same, and the same is to be paid according to said bond and mortgage. Upon the payment of the same by said Samuel S. Bowman and Felix A. Finn, the notes or

judgments unpaid against the said Morris L. Samuel & Co. or the notes upon judgment against persons who are reliable on said collections, shall be forthwith assigned to said Samuel S. Bowman and Felix A. Finn, and in the meantime no suit shall be brought against the said Samuel S. Bowman and Felix A. Finn, or Samuel S. Bowman & Co., and the bond and mortgage to be cancelled."

The cause was tried at a special term, before MULLIN, J. without a jury. The defendant moved, upon the pleadings, to dismiss the complaint, as not stating a cause of action; which motion was denied.

The judge found the following facts:

1. The firm of Morris L. Samuel & Co., of the city of New York, made their promissory notes in writing, described in the complaint in this action, payable to the order of Samuel S. Bowman & Co., a firm also of said city, and composed of the above named defendants, Samuel S. Bowman and Felix A. Finn.

2. The said notes were indorsed by said Samuel S. Bowman & Co. and delivered to the plaintiffs, who discounted the same before they became due; the said notes were not paid when due; were then duly protested, and due notice thereof given to said indorsers, Samuel S. Bowman & Co. The plaintiffs, ever since discounting the said notes, have been and still are the lawful owners and holders of the same, which have not been paid, nor any part thereof.

3. The total amount of said notes, with the fees for protest thereof, and interest accrued thereon to the first of February, 1858, was the sum of $9985.91.

4. In the month of February, 1858, the said Samuel S. Bowman & Co., in order to secure the plaintiffs against any loss on account of said notes, and to provide for their payment, delivered to the plaintiffs certain other notes made by other parties, as collaterals, the net proceeds of which, when collected, were to be applied to the payment of the said

notes made by said Morris L. Samuel & Co. and indorsed by said Samuel S. Bowman & Co.

5. As a further collateral security to the plaintiff, for the payment of the said first mentioned notes, the defendants, Samuel S. Bowman and Felix A. Finn, on the 20th day of February, 1858, executed and delivered to the plaintiffs their bond, conditioned for the payment to the plaintiffs of the sum of $7317.14, as set out in the said complaint; and as a further collateral security for the payment of the said indebtedness, the defendants, Samuel S. Bowman and Sarah S. Bowman his wife, on the said 20th day of February, 1858, executed and delivered to the plaintiff their mortgage mentioned in said complaint, in the said amount of $7317.14, on the premises therein described.

6. The notes delivered by Samuel S. Bowman & Co. to the plaintiffs, as collateral security for the payment of the said notes of Morris L. Samuel & Co., were returned to said Samuel S. Bowman, at his request, on the 30th day of April, 1858, with the exception of two notes made by McSpedon & Baker, which are now in suit, and the notes of two parties which have been paid, and which were credited on the amount of the said notes of Morris L. Samuel & Co. held by the plaintiffs before said bond and mortgage were given, excepting the sum of $87.50 since paid.

7. The defendants, Sarah S. Bowman and Samuel S. Bowman, by their deeds, dated July 13, 1860, conveyed the premises described in the said mortgage, to the defendant Patrick Callaghan, subject to said mortgage, which, in and by said deed, the said Patrick Callaghan assumed to pay as part of the consideration money of the said premises.

8. The interest in or lien upon said mortgaged premises had or claimed by the defendants, Sarah S. Bowman, Patrick Callaghan and Gertrude B. his wife, Mary E. Horsfall and Joseph Horsfall, accrued subsequent and is subordinate to the said mortgage lien of the plaintiffs on said premises.

9. The said bond and mortgage of the plaintiffs have not been paid, and there is due thereon to the plaintiffs, as well as on the said notes first above mentioned, the sum of $7317.14 principal, and $1329.43 interest, making the sum of $8646.57.

And as a conclusion of law, the judge found that the plaintiff was entitled to the relief demanded in the complaint, to wit, the foreclosure and sale of the premises mentioned in said complaint for the payment and satisfaction of their said debt, together with the costs of this action.

The defendants Bowman and wife, and Patrick Callaghan, appealed from the judgment.

S. Sanxay, for the appellants. I. The motion for a dismissal of the complaint should have been granted. 1. The complaint did not state facts sufficient to constitute a cause of action for the foreclosure of the mortgage, or otherwise. The mortgage was executed by Bowman and his wife without any consideration moving to *them;* but only as a collateral security for a bond made by Bowman & Co., a firm composed of Samuel S. Bowman and Felix A. Finn, who were *quoad* Bowman and wife, third parties; which was in itself given as a collateral security for the payment of certain notes made by certain other parties, whose names are stated; nor are the amount, dates or time of said notes given; nor is it alleged that the same had become due, or were unpaid, or how much was due upon said notes, if any thing. 2. The bond to secure which said mortgage was given, though for a stated sum, was in truth for a conditional and uncertain amount, depending upon the *contingency* of the *collection* of certain notes, and of the *application* of the amount thereof *when collected*, and was to be available only for the balance that might remain due after such *application of such collections*, if any thing. 3. There is no allegation that any of said notes had become due, or what had become of them.

II. The bond which the mortgage was given to secure, was void for uncertainty. It is uncertain in amount, and time when payable, and can only be made certain by extrinsic *facts*, which are entirely omitted to be stated, even if they exist. The statement of a conclusion of law is not sufficient. The statements may all be true, and yet the notes and collaterals may not be due, or may have been passed away or transferred, &c. No fact is stated from which any conclusion can be deduced that the bond is due, or that any sum whatever is due upon it.

E. L. Fancher, for the respondents.

By the Court, CLERKE, J. There is no force whatever in the objections taken by the defendants' counsel in his two first points. The complaint sets out the indebtedness clearly, and that the mortgage in question was given to secure the payment of a bond, by which the time for the payment of this indebtedness was considerably extended. It also shows that Bowman & Finn have failed to comply with the conditions of the bond. These facts surely constitute a sufficient cause of action. As to the assertion that the bond was void for uncertainty, as the case contains no copy of it, we can only be guided by what the complaint states it to be. The amount is distinctly stated, as well as the periods at which it is payable. Besides, it would not be void for uncertainty, if it could be made certain by extrinsic facts. *Id certum est, quod certum reddi potest.*

The defendant Bowman certainly has no right to complain of the surrender of some of the collateral notes to him. As to the remaining three notes, retained by the plaintiffs, they have a right to retain them until their debt shall be paid. This was the agreement, and they are under no obligation to surrender them. The stipulation in the receipt contains no promise on the part of the plaintiffs not to bring an action to foreclose this mortgage, when the time of payment mention-

ed in the bond has elapsed. The clause referred to means that until the expiration of that time no suit shall be brought.

The judgment should be affirmed with costs.

[New York General Term, February 1, 1865. *Ingraham*, *Sutherland* and *Clerke*, Justices.]

Bates, Executor, &c. *vs.* Hillman.

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C. H. at the death of a testatrix, being indebted to her over $1700, her will contained the following clause: "I hereby direct that C. H. shall not be required to pay upon any part of his indebtedness to me any thing more than the interest thereon for the term of five years after my decease." *Held* that this clause discharged or forgave the principal of C. H's indebtedness, requiring him to pay only the interest thereon for five years.

Held, *also*, that the testatrix having made a will, the presumption was that she did not intend to die intestate as to this portion of her estate.

THIS action was brought by the plaintiff, as executor of Lurana Cotes deceased, to recover demands claimed to be due to the testatrix from the defendant. The defendant alleged in his answer, and claimed on the trial, that the indebtedness was discharged by the testatrix, by the 7th clause of her will. On the trial the court ordered a verdict for the defendant. Exceptions were taken, which were ordered to be heard in the first instance at a general term.

D. C. Bates, plaintiff, in person.

N. C. Moak, for the defendant.

By the Court, Parker, P. J. The defendant was indebted to Lurana Cotes, the plaintiff's testatrix, at the time of her death, upon three several demands, amounting to upwards of

$1700, to recover which this action is brought. He sets up the will of the testatrix as a defense, by which he insists the debt is discharged, after payment by him of five years interest thereon from the time of her death, which he alleges, and which it was admitted, he has paid. The clause in the will under which the defendant claims that the indebtedness is discharged is as follows: "Seventh. I hereby direct that Calvin Hillman shall not be required to pay upon any part of his indebtedness to me anything more than the interest thereon for the term of five years after my decease." The will consists of but eight clauses. The six preceding the one above set out, are devoted to the giving of legacies, and each commences with the words, "I give and bequeath." The eighth and last clause is the one appointing the executor. The testatrix was a widow, without children, but having nephews and nieces, to whom legacies are given by some of the preceding clauses of the will. She resided at the time of her death with Margaret Sliter, not a relative, to whom she bequeathed one thousand dollars. She was seventy-six years old at the time of her death; had been in the habit of visiting at the defendant's from time to time, frequently staying a week, and had often received visits from the defendant and his wife, at Mrs. Sliter's; and the defendant's wife was there during her last sickness and helped take care of her. She died possessed of sufficient personal property, exclusive of her demands against the defendant, to pay her debts and legacies and the expenses of administration.

On the trial at the circuit, the court held, that by the seventh clause of her will the indebtedness for which this suit is brought, except the five years interest thereon, which had been paid, was discharged, and directed a verdict for the defendant, to which ruling the plaintiff excepted, and the exceptions were ordered to be heard in the first instance at general term.

The simple question presented is, how is the seventh clause of the will to be construed? Does it intend to discharge the

whole indebtedness of the defendant, except the five years interest, or merely to extend the credit upon the principal for a term of five years after the decease of the testatrix? It is extremely difficult, if not impossible, to determine from the order and grammatical arrangement of the words used, unpunctuated as they are, which of the two constructions to give to the clause in question; and it is clearly, if not equally, susceptible of both.

It is insisted by the plaintiff that the change of expression from "I give and bequeath," as it is in the first six clauses, to "I hereby direct," in the seventh clause, indicates a change of purpose, and shows that no gift was intended by the seventh clause. But when it is considered that the benefit intended to be conferred by the seventh clause, if the defendant's construction is to prevail, is to discharge an indebtedness, it will be seen that the language adopted is quite as appropriate to that purpose as that used in the previous clauses would have been. It is also said that the plaintiff's construction is the more obvious and natural one, inasmuch as it is improbable, if the testatrix intended to discharge the debt, that she would have reserved the interest on it for five years. And this criticism is certainly not without weight. On the other hand it is said that the presumption is that the testatrix, having made her will, did not intend to die intestate as to the portion of her estate consisting of the defendant's indebtedness to her, as it is admitted she did if the indebtedness is not discharged. It is undoubtedly true that a court will usually, in a case of doubt, avoid such construction of a will as would lead to an actual intestacy. (4 *Ves.* 59, *n.* 2. 3 *id.* 426, *n.* 3, 367.) And although this rule has a more special application to the residuary clause in a will, still I think it is not wholly confined to such cases; but that in this case, from the fact that this portion of the estate was in the mind of the testatrix when making her will, and is introduced into it by language which is ambiguous, the presumption above alluded to arises, to assist the con-

struction and induce that which shall prevent intestacy as to the property in question.

There is another consideration which seems to me very strongly to tend to the same construction. The fact that the testatrix had undertaken, in this clause of the will, to do something for the benefit of the defendant, is, I think, undeniable. Now there is nothing in the case to show that five years credit on the principal of the debt, the interest being required, was a benefit to the defendant, or could have been so considered by the testatrix. It is certainly not a self evident proposition that it was such benefit. It often happens that the delay of payment of principal which is over due when the interest is paid is an advantage to the creditor rather than to the debtor. The intent of the testatrix to benefit the defendant, does not, therefore, seem to be carried out by the plaintiff's construction; and in order to give effect to such intent, we are driven to the other construction, which makes the clause a discharge of the debt.

Upon the whole I am inclined to think the ruling at the circuit was right, and that a new trial should be ordered and judgment given upon the verdict for the defendant.

Judgment accordingly.

[Broome General Term, January 26, 1865. *Parker*, *Mason* and *Balcom*, Justices.]

APPENDIX.

WILLIAM CURTIS NOYES, LL. D.

DIED AT HIS RESIDENCE IN THE CITY OF NEW YORK, ON THE 25TH DAY OF DECEMBER, 1864, IN THE SIXTIETH YEAR OF HIS AGE.

Mr. Noyes was born at Castleton, Rensselaer county, on the 19th of August, 1805. His father was George Noyes, a most upright, honorable man, highly respected by all who knew him. His mother, from whom he derived his middle name, was a lady of more than ordinary intelligence and refinement. Enjoying no other advantages, in the way of acquiring an education, than what the common school and academy afforded, Mr. Noyes, with a pretty good knowledge of Latin, at the early age of fourteen, entered the office of Welcome Esleeck, Esq. of Albany, and commenced the study of that profession of which he was destined to become so distinguished an ornament. After remaining there about a year, he went into the office of S. B. Ludlow, Esq. where he continued until the age of nineteen, when, upon his parents removing to Oriskany, Oneida county, Mr. Noyes entered the office of Storrs & White, at Whitesboro', and completed his studies under the guidance of those eminent lawyers. He was admitted as an attorney of the supreme court, in February, 1827, and a counselor, in 1830. He commenced the practice of the law, in 1827, as a partner of Wheeler Barnes, Esq. a sound lawyer, a correct practitioner, and a most amiable man. It was the writer's good fortune to be in the office of Barnes & Noyes, as a student, in 1828 and 1829, and to enjoy the benefit of their instruction and advice. And it gives him a melancholy pleasure, after this

lapse of time, and after the grave has closed over both of his early instructors and guides, to bear witness to their uniform kindness, patience and courtesy.

Mr. NOYES' predecessor in this office was the Hon. HIRAM DENIO, now chief judge of the court of appeals.

At the close of his partnership with Mr. BARNES, Mr. NOYES formed a partnership with the Hon. HENRY A. FOSTER, now a judge of the supreme court, in the fifth judicial district, and CHARLES TRACY, Esq. and continued the practice of law, at Rome, for some three or four years. He then removed to Utica, where he practiced law for several years, in partnership with WILLIAM TRACY, Esq. In 1838 he removed to the city of New York, and formed a partnership with JOHN LORIMER GRAHAM, Esq. Here he took a commanding position, from the very first; and his ability, learning and industry, combined with a pleasing address, and polished manners, soon brought him into notice and ensured success. He rapidly won a large and constantly augmenting business, and at the time of his death he stood, if not at the head, certainly in the very front ranks, of the bar of the metropolis; and was employed, on one side or the other, in nearly all the most important cases. Starting in life without the advantages of a collegiate education, or the assistance of "friends at court," he attained the very highest standing in his profession, not as the result of mere good fortune, but as the natural outgrowth of persevering labor and undeviating rectitude guided by quick perceptions and a sound judgment. It has been well said: "The future student and practitioner of the law will find, as he pores over the reports of our higher courts, that very many of the most important cases, involving the settlement and elucidation of fundamental principles of law, are enduring monuments of the tact, learning and persistent advocacy of WILLIAM CURTIS NOYES. His briefs and arguments were so exhaustive of the history of the law on the subject under discussion, that they will be resorted to as copious sources to lighten the labors of professional researches." His management of the North American Trust and Banking Company's case, and his able and learned exposition of the history and doctrine of charitable uses, in the *Rose will* case, and in *Beekman* v. *Bonsor*, (see his elaborate argument in this last case, 23 N. Y. Rep. 575,) may be mentioned as striking illustrations of his erudition and untiring labor, and his capacity for research. But the greatest triumph of Mr. NOYES' professional life, perhaps, was achieved in the great "omnibus suit," of the New York and New Haven Rail Road Company against Schuyler and others. This

contest is thus described in the New York *Transcript:* "He fought the questions of law into the court of appeals, and won a signal victory there, first in the Mechanics' Bank case, and then on the demurrer to the "omnibus" complaint. But his adversaries fought the whole battle over again on the trial of the issues of fact, which occupied *forty-two* days. There were thirty or forty lawyers arrayed against him, and the struggle was as bitter and determined as a Virginian campaign. Mr. NOYES did all the talking on his side, his associates acting only as consulting counsel; and he displayed a wonderful power of insight, quickness of tact, and fertility of general resources."

Mr. NOYES was twice married; first, to a daughter of the late WILLIAM G. TRACY, of Whitesboro', and secondly, to the daughter of the Hon. F. A. TALLMADGE, of the city of New York. His first wife, and two children, died while he resided at Utica. And in December, 1850, he lost his only son, who died quite young, a bereavement which Mr. NOYES felt most keenly. He left two daughters, one by each wife; the eldest being married previous to his death, and the other since.

In the year 1856 the honorary degree of Doctor of Laws was conferred upon Mr. NOYES, by Hamilton College.

Mr. NOYES' whole life was devoted to his profession. Yet he had a taste for general literature, and was fond of miscellaneous reading, especially poetry. He had collected a large and valuable library of miscellaneous books, and was familiar with all the best authors. He also possessed one of the most valuable private *law libraries* in the country, consisting of all the American reports, with scarcely an exception, down to the present time; all the English reports in the courts of law and chancery, and in the exchequer; all the Scotch decisions in the judiciary, session courts, and house of lords; and the Irish reports in law and equity, the ancient and modern state trials, and all the standard and many of the rarest earlier treatises. Mr. NOYES had gathered also a very rare collection of the Domesday books, and a considerable collection of codes, among which are the Chinese and Gentoo.

This library, of which an interesting description will be found in "Wynne's Private Libraries of New York," contained over seven thousand volumes, collected with unusual care by Mr. NOYES, during a period of more than twenty-five years, and was valued at some $60,000. It was bequeathed by him to Hamilton College, for the benefit of the successive classes of young men who are, from

year to year, to be educated in the law department of that excellent institution.

Though *decided* in his political opinions, he was never an *active* politician. He never sought office; nor did he hold any official station, with the exception of one connected with his own profession — that of district attorney of Oneida county. He was nominated for the office of attorney general, by his friends, in 1857, when, though running considerably ahead of his ticket, he shared in the general defeat of his party. He was a member of the peace convention which sat at Washington in 1861, where he labored to avert the storm of civil war; but when he saw that it was unavoidable, he promptly gave his support to the government. He spared no pains or efforts to obtain men and money for the prosecution of the war.

In 1861 some friends presented the name of Mr. Noyes as a candidate for the United States senatorship, but political combinations and necessities prevented it from becoming very prominent. Again, in 1863, Mr. Noyes was mentioned in connection with the vacant place in the senate, but commercial influences predominated, and a choice was made from the mercantile class.

For the last eight years of his life Mr. Noyes was engaged in a work of sufficient magnitude and importance to task his utmost energies. In 1857 the legislature appointed David Dudley Field, Alexander W. Bradford and Mr. Noyes commissioners to prepare a *civil code*, which was to be divided into three portions — the political code, the civil code, and the penal code. Mr. Noyes had the main charge of the penal code, to which he gave the finishing touch the very day before he was stricken down by the disease which terminated his life. He also revised some proof sheets of the civil code, now in course of final publication.

To his brethren at the bar, Mr. Noyes was ever considerate and courteous. To the younger members of the profession his manner was kind and encouraging. His demeanor in court was respectful and decorous. He had a great deal of self-control; and no sarcasm ever drew from him an ungentlemanly reply. Though free from any thing like assumption, he had a sort of quiet dignity of manners which always commanded respect. He had a keen perception, and a hearty enjoyment, of every thing in the shape of wit and humor; and — in his younger days at least — he was ever ready, and able, on short notice, to contribute his share.

In the management of his office business, and in the preparation and arrangement of his papers, Mr. Noyes' habits of neatness, order

and system were admirable. He never went into court without having his papers in the right shape.

In the social circle Mr. NOYES was deservedly held in high esteem and honor; and the troops of attached friends who now mourn his loss bear witness to his genial qualities and social virtues. It has been well said of him that "his private life was as pure as his public record was spotless."

Having, early in life, made a profession of religion, he was, to the end, a devout, earnest and consistent christian; freely giving his money to the various benevolent societies, and for several years keeping a colporteur in the field at his sole expense.

On Thursday evening, December 22, 1864, Mr. NOYES attended the annual meeting of the New England Society. He was elected its president for the ensuing year, when he delivered an unpremeditated but felicitous inaugural address. The next morning, while in his room dressing, he was struck with paralysis, which prostrated him to the floor, and caused his death early on Sunday morning.

A meeting of the members of the bar of the city of New York was held on the 30th day of December, 1864, to express their sense of the loss sustained in the death of Mr. NOYES. It was very largely attended by the judiciary, as well as by the profession. Soon after the hour of meeting, 12 o'clock, M. the Chairman of the Committee of Arrangements, EDWARD H. OWEN, Esq. called the meeting to order, and nominated Hon. SAMUEL R. BETTS, Judge of the United States District Court for the southern district of New York, as President. JUDGE BETTS took the chair, and the following gentlemen were appointed

Vice Presidents.—Hon. WM. D. SHIPMAN, Judge of the United States District Court of Connecticut. Hon. HENRY E. DAVIES, Judge of the Court of Appeals. Hon. WM. H. LEONARD, Presiding Justice of the Supreme Court of this state for the first judicial district. Hon. ANTHONY L. ROBERTSON, Chief Justice of the Superior Court of this city. Hon. CHARLES P. DALY, First Judge of the Court of Common Pleas of the city and county of New York. Hon. CHARLES MASON, Justice of the Supreme Court for the sixth judicial district. DANIEL LORD, Esq. CHARLES P. KIRKLAND, Esq.

AARON J. VANDERPOEL and STEPHEN P. NASH, were appointed Secretaries.

Alexander W. Bradford, Esq. in presenting the resolutions prepared by the committee, said:

Mr. President: To me has been assigned the duty of presenting to this meeting resolutions expressive of the sentiments of the bar of New York on the decease of William Curtis Noyes.

Expecting that others will address you, longer and more intimately acquainted than myself with the private and active professional life of the deceased, I refrain from making any remarks introductory to the resolutions I am about to offer, except in one particular, in respect of which only one can speak besides myself.

For many years I was associated with Mr. Noyes in the preparation of the codes, under the commission of the legislature of the state of New York.

I desire to be a witness to his fidelity and labors in that sphere of duty.

It would be unbecoming for me to speak on the mooted subject of codification; but I can not refrain from saying that, in the discussions necessarily growing out of that subject, he evinced the highest qualities of the judge and the legislator, breadth of philanthropy, and the most earnest regard for a pure, sound and enlightened system of jurisprudence.

He grappled every subject with the ability of a master; he brought to bear all the treasures of his knowledge and experience, with prudence, skill and judgment; he heard with patience; he reasoned with candor, and without temper, and decided with judicial composure.

He labored more than others upon the close of the work, and as it was just finished he died.

Permit me to add another word.

Amid the engrossing toils and cares of professional life in this great metropolis, how few opportunities we enjoy of seeing the private and social life of our brethren.

We meet them mainly on the arena, as public men taking part in the discussions incident to the administration of the law. We know the high social character of Mr. Noyes, but it was indicated to men mainly in breadth and outline.

As we heard, in the funeral ceremonies of Wednesday, that eloquent, touching, most tender and beautiful elogium, pronounced over the remains of the dead, I could not but feel how little we know of the inner hearts and lives of our fellow men, how much exists that is pure and holy, and great and good, and yet unfathomed by the eye of friendship or professional brotherhood. Rare and precious tribute

was that not only to the worth and virtues of the deceased, but, through his exalted character, to the high dignity of the law and its faithful and just administration at the bar and on the bench.

I present the following resolutions:

WILLIAM CURTIS NOYES, a member of this bar, a beloved friend and brother, has in the providence of God been suddenly smitten by the stroke of death, to our great affliction and bereavement. For more than a quarter of a century he had largely participated in the practice and forensic discussions of our courts of all jurisdiction, and had justly attained a position of high eminence and distinction. His experience was various and extensive, his knowledge of the law and of its history exact and comprehensive, his apprehension of legal distinctions clear and precise, and he was thoroughly furnished for every trial of strength in those conflicts of the bar, upon which the administration of justice most intimately depends. His public life was marked by integrity of character, firmness of purpose, and adherence to principle. In his social walk, virtue and benevolence shed their radiance upon his way. Thus commanding the respect of the community and the affections of a wide circle of friends by a blameless, useful and honorable life, and having passed through a professional career of great success, at the zenith of his fame and in the full possession of ripened intellectual powers, he has been taken from us. In memory of our departed brother, we make this record of our sense of his merits and of our loss; and

Resolved, That we deeply deplore the removal from his sphere of usefulness and honor at the bar of New York of our beloved and distinguished member, WILLIAM CURTIS NOYES, by the hand of death, and regard the event as a calamity to his profession, to the interests, social and public, of the community in which he lived, to the state and to the country.

Resolved, That we entertain great satisfaction and pride in the memory of his wonderful attainments as a legal scholar and thorough lawyer; the labors he gave voluntarily in the service of the state, in the discharge of his duty as a commissioner of the code; the munificent spirit exhibited in the complete and splendid library he collected and freely opened to his brethren; the masterly skill and ability with which he performed his part in the profession he adorned, and the lustre which he shed as a great and accomplished lawyer upon the bar of New York.

Resolved, That we recognize among the traits which ennobled his character his invincible principle and rectitude of purpose, his truth as a man, and his severity of conscience, all tempered by courtesy and illumined by the light of christianity.

> Justum et tenacem propositi Virum
> Non civium ardor prava juventium,
> Non vultus instantis tyranni
> Mente quatit solida * *
> Si fractus illabitur Orbis
> Impavidum ferient ruinæ.

Resolved, That we sympathize most profoundly with the family of the deceased in their great distress and tribulation, and offer them our condolence and warmest prayers and wishes, conscious still that their highest con-

solation in the greatness of their loss, is in the history of a life well spent, a reputation without spot or blemish, and the celestial hopes which spring from the grave of an upright man.

DAVID DUDLEY FIELD, on seconding the motion to adopt the resolutions, said:

Mr. President: WILLIAM CURTIS NOYES, our deceased friend and brother, was born at Castleton, in the county of Rensselaer, on the 19th of August, 1805. His parents were in such moderate circumstances, that he had not those advantages of early culture which were the lot of most of his professional brethren. While yet a lad of fourteen, he was taken into a lawyer's office in his native village. His parents soon after removed to the county of Oneida, where he entered the office of HENRY R. STORRS, a worthy teacher of a worthy pupil. In 1827 he was admitted an attorney, and in the usual course came to the degree of counsel. It was not long before he made himself known, and while he was yet under the age of thirty he was appointed the district attorney of the county. This was a particular compliment, since the county of Oneida, like the counties of Albany and Dutchess, has always been distinguished for its eminent lawyers.

In 1838 Mr. NOYES removed to this city. Here he rose by gradual process to that disitinction and honor in which he died.

His great characterestic was skillful, pains-taking research. Every one who has been associated with him in the conduct of cases knows that he brought to consultations a memory full of precedents, and when the argument came on there was a careful analysis of the facts, and an affluence of learning applicable to them, which left little for others to supply.

The lesson which we may learn from his life is, that the most solid professional fame is the result of slow advances. The massive structure that rises high into the air rests upon foundations which are sunk deep into the earth, and is built up, stone carefully laid upon stone, till it appears at last in grand proportions and perfect symmetry. So it is with the fame of a great lawyer. It does not come from one great effort, nor from a few successful cases, nor from flashing wit, nor from brilliant rhetoric, but from careful study, patient thought and ripe experience.

It was my fortune to be often associated with Mr. NOYES, but there were two occasions in which we were much together outside of professional life, to which I ought to allude. One was the peace conference of 1861, and the other the code commission. In the peace conference Mr. NOYES and myself stood on almost every question

firmly together. I mean, of course, to abstain from all allusion to anything partisan in character, or personal to myself; but I will say for him that he foresaw the terrible conflict that was impending, and, while he braced himself strongly to meet it, he sought to avoid it by every means short of a surrender of what he believed to be the principle of eternal and immutable justice.

The present code commission was created by the legislature in 1857. My friend, who has just presented the resolutions for the consideration of this meeting, Mr. NOYES, and myself, have been engaged on the laborious but almost thankless task for these nearly eight succeeding years. Our last conference had been had, our work was ended, all but the revision of the sheets from the press, when our comrade departed, leaving us, in mournful memory of him, to lay before the legislature the record and the result of our labors. Our friend and brother, a week ago yesterday, was moving amongst us with a firm step, in the fullness of all his faculties; the next morning he was stricken by the unseen hand; his eyelids fell, never to be lifted again; his hand sank heavy by his side and his mind lost all consciousness of mortal things. Life, however, clung to the body till the Sabbath came, and then, at the hour when the morning chant went up of the christmas hymn, his spirit returned to the bosom of its Maker. On the third day after, we, his brethren, looked for the last time upon his face as he lay in his coffin covered with flowers under the dome of his library, surrounded by the books which were the witnesses and helpers of his studies; thence we followed him to the narrow house appointed for all the living, and here we are, within the week from the day when he was stricken down, to record our testimony to his worth and our regret for his departure.

Verily, man walketh in shadows and disquieteth himself in vain.

REMARKS OF GEORGE T. CURTIS, ESQ.

My relations, Mr. Chairman, with the very able and learned lawyer whose sudden death has brought us together were not intimate, but they were always friendly. Indeed, sir, it is due to his memory and to my own feelings that I should say here, that, notwithstanding the wide difference of opinion between us concerning many things which relate to the welfare of the country, I was received by him, when I sought a place at this bar, with the greatest kindness, cordiality and good will. On the only occasion in which I have encountered him professionally, an occasion involving a question of vast public concern, I had a full opportunity to estimate and to feel his power. On the

merits of that question, I need not say to you, brethren, that he dealt vigorous and effective blows; but I ought to say here, sir, that they were given with an urbanity towards his opponent, and a frank admission of the purity and patriotism with which views diametrically opposite to his own could be maintained, which others who witnessed that contest may, perhaps, have noticed at the time, but which I certainly ought never to forget. I may say of him, as I trust and as I know he would have said of me, however fundamentally I differed from him on a great constitutional question, and on its bearings upon the public good, we had no other desire than to establish the republic, to strengthen its foundation, and to perpetuate its government.

Mr. President, as I passed, on Sunday, by the magnificent library which Mr. NOYES had collected with so much skill and judgment, and turning the corner of the street, saw the sad signal which denoted that death had entered that house, I mentally exclaimed, in the oppression of the moment, "How vainly man heapeth up even intellectual riches!" But yet, sir, true as this is in one sense, it is not wholly true; for of our profession, brethren, undoubtedly it may without presumption be said, that he who busies himself righteously in adjusting the conflicting interests of his fellow men, who gives his days and nights to the severe studies of jusisprudence, and who attains to some adequate perception of those eternal principles of truth and justice which bring even human legislation into some correspondence with the Divine, thereby fits himself as well, perhaps, as by any pursuit, to approach those sources of light whose voice, it has been said, is the harmony of the universe, and whose seat is in the bosom of God, or at least to the confines of that realm where the voice of absolute truth is ever sounding, and the everlasting oracles are perpetually deciding, we may humbly hope, the spirit of this good man has gone, to be drawn nearer and nearer to the Infinite Wisdom. He was, sir, it appears from the statement of Mr. FIELD, unblest in his youth by the advantages of what is called a liberal or collegiate education; but I think, sir, that no one would have imagined this from his conversation and from his public performances. To one who came to know him, as I did, in the fullnes of his matured years and in the abundance of his knowledge, he seemed always like a man who must have had the full benefit of classical training in early youth. Certainly he was a man of large and liberal culture; besides being a great student of the law, he was an accomplished and efficient advocate, and an enlightened and comprehensive jurist. Perhaps, sir, he has compared the codes of different states and nations more extensively than any American lawyer

who has survived him; and the people of New York have largely profited, and I understand, are still further to profit by the result of his labors. It may be, sir, that it is even already too early to estimate the sum of what society has gained, or is to gain, by the labors of Mr. NOYES and his colleagues in the great work of codification. Perhaps the crucial test of that experiment will come upon the society when the definition and principles of the common law are made to give place in respect to crimes, to a fixed, and positive test; but, whenever it comes, and whatever may be the result of the judgment of the community, the name of Mr. NOYES must always stand very high on the list of those who have enabled these great experiments to be tried under the best auspices and with the fairest prospects of success.

But, sir, it is for others, more appropriately than for me, to enlarge upon his character and reputation. I rose but to express in the fewest words what seemed becoming in me to say of a man of great professional distinction and private worth, whom I had scarcely the honor to call a friend, but with whom my intercourse has always been most agreeable and kindly, and whose death this community has so much reason to deplore.

REMARKS OF A. J. VANDERPOEL, ESQ.

Mr. Chairman—I have been desired, as one who for a time pursued legal studies in the office of Mr. NOYES, to bear a tribute to his memory, on behalf of the younger members of the Bar, and I have thought it well to make some notes in reference to the kindness which always marked his intercourse with us.

To say that Mr. NOYES, after he had taken a prominent position as a lawyer, was upon all occasions kind and courteous to the junior members of the Bar, would but faintly express the truth. Every young man within the sound of my voice, who either enjoyed his personal acquaintance, or came in contact with him in the accidental meetings of professional engagements, has probably felt that Mr. NOYES sympathized with *him* as he witnessed his doubts and efforts. At the age of 14, Mr. NOYES entered the office of WELCOME ESLEECK, an eminent lawyer of Albany, as a student. He remained there a short time, when he removed to the office of SAMUEL B. LUDLOW, now a much respected citizen of Oswego, who then enjoyed a large practice at Nassau, in the county of Rensselaer.

His years from fifteen to nineteen were spent in Mr. LUDLOW'S office; and during this period, in addition to performing all the cleri-

cal labor of the office, he prepared an abridgment of Caines' Practice, making at the same time copious notes of the changes occasioned by statutory enactments, as well as references to the judicial decisions on matters of practice which had been made during the fourteen years that Caines was the standard work on that subject in this state.

His assiduity at that time called from Mr. LUDLOW the prediction that the quiet and unobtrusive boy would, with good health, take at an early day a prominent rank at the Bar. This prediction was soon verified. In the second and third volumes of Wendell, we find reports of motions argued by him at the Special Terms. About a year after he received his degree as counsel, we find his name in the 4th of Wendell, as counsel for the defendant in error, opposed to JOSHUA A. SPENCER, then the recognized leader of the *Nisi Prius* Bar of Central New York. This, he told me, was the first case he argued before the Supreme Court in banc. A note of his argument, as there inserted, exhibits the same research and the same readiness to combat a doubtful proposition, even though sanctioned by the name of the venerated STARKIE, which have characterized the labors of his later years.

From that time, we find his name as counsel in every volume of New York reports.

During the period I was in Mr. NOYES' office, he was afflicted with loss of eye-sight to such a degree as required him to rely upon an amanuensis. Embarassed even by this difficulty, he never exhibited impatience nor faltered in his labor. In addition to his other office and court business, he was then much occupied in preparing the answers in the suits known as the million and half-million trust cases.

It was a pleasure to meet him in his library, evenings, as was occasionally necessary in the absence of his regular assistant, and aid him in his researches. The evening's study was interspersed with professional anecdotes, and with reference to quaint and curious passages from the earlier reports and treatises, which he was fond of collecting in his common place book.

No matter to what stage of the subject under investigation he had progressed, he was ready to retrace his steps and explain the point involved, so as to enable the student, if inclined, to follow it at any other time or place.

It has often been said that, however great the advantages which the large field of observation and experience to be found in a city life offer to the law student, it is better he should remain in an office in the country, where he has more responsibility thrown upon him, and

is brought into more immediate contact with and incidentally receives much more attention from his instructor.

This is undoubtedly true as a general rule. The lawyer immersed in city practice finds it difficult to take the time from his pressing engagements to devote to directing the studies of the beginner. But the several gentlemen around me, who have been students under Mr. NOYES, will agree that he was an exception to this rule. No young man ever entered his office with a desire to improve his opportunities, who did not, from the first day, feel that he had been placed in the charge of one who took an interest in his progress and success, one who was at all times ready and willing to instruct, direct and encourage him by words and by example.

In his intercourse with young men there was a sincerity as well as freedom of manner, which made the approach to him for counsel and instruction easy.

The deep interest which he took in the subject of a more thorough education of young lawyers manifested itself of late years in his encouragement of our law schools. When his engagements would permit, he was always willing to give an hour's instruction in the lecture room, and, cheered by the success of the Columbia College School, he has during the past year taken an active part in the organization of the law school attached to the University, and proposed, during the present winter, to aid it by delivering a course of lectures on criminal law.

Those who have met him in consultation have been struck with the readiness with which he referred to cases, and particularly to those in Johnson and Cowen's Reports. He used to suggest to young men in his office, as an excellent mode of study, in connection with the text books, a careful reading of the reports, giving as a reason that the student there found the principles he had studied in the text-books applied to facts in great variety. He had pursued this course, and while a clerk and attorney had read all of Johnson's and nearly all of Cowen's Reports, beginning with the latest volume, and reading in the reverse order.

That thorough preparation for every trial and argument, which was so marked in him, he sought to impress upon his students as being absolutely necessary for success. When he desired a student to examine a question, he required him to collect and analyze all the learning the books afforded upon the subject. By always pursuing this course himself, he had become a very learned lawyer.

In his office life, and with his students, he never failed to maintain

the character of a christian gentleman. Always consistent to the religious principles he professed at an early age, his daily life "was a bright and shining light."

What better example can be presented to stimulate and encourage young men?

REMARKS OF JAMES T. BRADY, ESQ.

Mr. President and Gentlemen of the Bar: I feel proud of having been assigned to the position which I occupy at this moment. I am glad — although the duty seems a very solemn one, inasmuch as our friend, obedient to the great demands of nature, has passed forever away from men — that I am permitted to speak a few unstudied words about a gentleman between whom and myself there never existed relations so close and intimate as those which, happily for them, existed between the gentleman who preceded me and the deceased. It seems singular to me, when I reflect, that, although I have been many years connected with this profession, I do not, at this moment, remember a single instance in which I was associated professionally with Mr. NOYES, and I feel, therefore, that I am incapable of expressing any just opinion in regard to his actual merit — for no accurate observer, who has ever been amongst lawyers, can have failed to discover that you can never truly estimate the genius, talent, acquirements, skill or prowess of a lawyer merely from being his opponent. It is required, in order to perfect your judgment in that respect, that you should have been associated with him, employed in laboring upon the same material, to see how readily his perception fastens upon the salient points suitable to his own side, and deducts those of the other which it may be necessary to assail. The lawyer, unlike the members of any other profession, never can be contented to rest satisfied with his own views of any subject which he investigates, and he can never deal justly with that subject unless he has ever present before him an intellect which he is willing to acknowledge to be equal to his own, and contemplates it engaged in searching the other side with tact and perseverance for points which may operate against him, and which he must encounter. Therefore, I am right in saying that, not having been a co-laborer with him, never having known with what rapidity and perseverance he used the resources which the intellectual employ in the investigation of juridical questions, I must be content to express what I have learned from being his opponent, and his opponent on some occasions when it happened, as it always will happen, that even a gentleman so cautious and well bred and refined in feeling as

Mr. NOYES will be betrayed into those exhibitions of emotion and feeling and heat which attend the progress of every lawyer, however cautious, in the various struggles of our professional existence. No one could be employed against Mr. NOYES without discovering that his perspective faculties were very rapid in operation; that his reasoning powers were good, that he was skillful in attack and adroit in defense; that he persevered to the last; that he never abandoned a position while it seemed at all tenable; and perhaps one of his great errors, or great merits, as the Bar may decide for themselves, was that, driven from one position to another, he would take refuge at last even in sophism rather than acknowledge himself defeated. I have said that he was skillful in attack; he was also powerful. I think we might apply to him the remark made by the great Webster in reference to Jeremiah Mason, that "his satire was cool and vitriolic" — not often employed: I do not know that it ever was without justification — but never that an ingenious adversary would not admit that it was a thing to feel and not easy to forget. My friends have mentioned that he was district attorney at an early period of his life, and they have alluded to the fact that he lacked what is considered a great endowment of youth, a collegiate education. Certainly, that is a great deprivation in entering upon professional life, but he seems to have been favored with a capacity to educate himself, and to have exercised it to the fullest point with the most untiring industry. He must have devoted no little time to the careful study of the criminal law; for certainly it was a branch of practice for which he seemed to have no regard, and in connection with which he permitted himself but seldom to be employed; and yet I may be excused for reminding the profession that, in a certain case which at the time excited a little public attention, from the fact that it involved important juridical questions — the Huntington trial — Mr. NOYES was associated with my friend OAKEY HALL, district attorney, against me. I had heard all the great district attorneys, from the time I was sixteen years of age, including the brilliant HOFFMAN, and the great student, the profound lawyer, the excellent and venerable gentleman, my friend, Mr. MAXWELL, by whose presence we are now honored; and I feel myself justified in saying that for skill, discretion, calmness, judgment and the powerful presentation of his case to the jury at the close, the effort of Mr. NOYES on that occasion was amongst the very ablest, in my judgment, to which I had ever listened. And I believe that NOYES's closing effort in that case may justly be attributed the conclusion

which was reached, and which seemed, at the time, to satisfy every one but myself.

Mr. NOYES, I know, from intimate association in the halcyon periods of my professional life, was a gentleman of exquisite literary taste. We had the good fortune to live during that period of our profession in this state, when suspicion never, so far as I know, attached itself even for a single instant to the character of the judiciary. We had the good fortune to live, too, at a time when some of the most brilliant advocates that this state has ever produced were in the full exercise of their professional employments. We lived, too, during that period when the old supreme court of this state drew together, at its regular sessions, all gentlemen, young, middle aged and old, who were deemed worthy of being retained to appear in that most respectable and most respected tribunal. I call those halcyon days, because gentlemen from every part of the state, from the necessity of their professional engagements, met there three or four times a year, and had an opportunity to interchange feelings, hopes, wishes, and make comparisons, in reference to their professional life, and, to express it all in one word, to indulge in fraternal association. Thus I was enabled to converse with him when we were traveling to attend court at Rochester, or Utica, or Albany, on various subjects; and I remember a favorite quotation of his, and how true at the time it seemed:

"Life is the rose's hope, while yet unblown."

Beautiful and sad in its significance! We can imagine, looking through the medium of poetry, how in its very inception the bud looks forward to the glad moment when the sunlight shall flash upon its brilliant tints, and all the senses of the beings for whose gratification it seems to have been designed should be moved in its presence; and yet, beautiful as that flower may be, it must, in the established order of nature, fall and perish. I believe that we had a just estimate of the uncertainty of life. I suppose we knew what all of us ought to feel, that at the instant we begin to live we also begin to die. I heard from the lips of the reverend gentleman in the church where his remains were carried the other day, that, with the sincere spirit of the true christian, he had prepared himself for the other world, which none should fail to hold in contemplation, especially in view of the suddenness with which death laid its hand upon our departed brother.

ADDRESS OF CHARLES O'CONOR, ESQ.

Mr. President and brethren of the bar: — Those who have contended in the forum with our departed brother can best testify to his very

great capacity for the post of an advocate in the courts of justice — his great natural capacity, because endowed with the strong sense of justice and conscience that stimulated him to the sacrifice of self and life's enjoyments, to the fullest measure that necessity might require, for the purpose of performing to perfection and to its utmost fullness the duty of the advocate. This temper made him a laborious student — made him apparently an ambitious lawyer; but, in truth, his character is better described by the single term, the faithful and the skillful advocate. His labors were not directed to making a great name, but to accomplish the great duty of failing never in his undertakings on behalf of those whom he considered applicants at the tribunals of justice, in the enforcement and the establishment of their rights. Mr. NOYES is thus spoken of by those who had occasion to contend with him, and had thence the best opportunity of judging his character and appreciating his abilities. But those who associated with him as friendly champions in professional pursuits — who had the pleasure of enjoying his society in social intercourse, and who enjoyed the measureless advantages (I mean those outside of our profession) of having him for a daily adviser in the concerns of life, that might become the subjects of judicial employment, and who had him for their champion in their hour of trial — can speak of him in other terms. They speak of him in language that, perhaps, indicates more consideration for self than for him, but which forms the highest eulogy that can be pronounced. They speak of him as a friend whose loss is to them irreparable, and, for the time, appears impossible to be supplied — who joined in commending his high qualities, whose words have been heard expressive of their sentiments amidst this multitude, who mourn his loss. It might probably be well, and but for a single circumstance would be my course; but, standing here, silently acquiescing in the ample and sufficient expression of grief and of admiration that this meeting has heard, a single circumstance impels me to a somewhat different course, and leads me to utter a few sentences, in concurrence with what has been already so ably and so eloquently expressed. It has been my fortune to be associated with Mr. NOYES, and to meet him, I may say, in all attitudes and in all capacities. I had the pleasure of associating with him and with his respected family. I have contended against him full many a time and oft, in all the ardor and excitement so usual in courts of justice, and where advocates warmly espousing their respective sides, and convinced for the moment each that he was right, strike without fear, favor or affection, endeavoring always to remember justice. I say I have been in contact with him in most all capa

cities. I have contended against him forensically very often. I have been associated with him in some of the most interesting and important causes which have occupied his attention and mine, and engaged our affections and our interests for long years of our respective lives. Perhaps it might not be amiss, in connection with the single topic which I mean to present as the point of my remarks, to say that except as being natives of the same state, except as being members of the same honorable profession, we might be said to have stood in a position of remarkable antagonism during the long period of our association — a period covering very nearly all the active life of each of us. We were of opposite descent and race; we differed, it may be said, in blood; we differed in creed; we differed in political opinions; we differed in those great moral questions connected with the social order, which are supposed to underlie much of the difficulties and controversies which have existed in this country. And gentlemen, I may be permitted to say, that the difference was as deep, and as earnest, and as distinct as it was sincere; yet, holding these relations, permit me to say that, ardent and enthusiastic and earnest as Mr. NOYES was, and as I am willing to avow myself generally to be when engaged in any conflict, in the long period of our association, never once, under any measure of excitement, however great, did Mr. NOYES, when contending with me, depart even for an instant, or in the slightest degree, from a course of the strictest courtesy, and the utmost personal kindness. Though thus antagonistic in almost all things that might tend to create adverse feelings, Mr. NOYES proved himself, and I found him by this most cogent proof, to be a thorough christian and a thorough gentleman. We have never met without a smile; we never parted without a cordial greeting. Peace to his ashes. He was an honor to the name of a christian and a gentleman; he is a loss to the profession and the country.

REMARKS OF HON. WM. M. EVARTS.

In assenting, Mr. President, to the wishes of the committee which assigned me a participation in the proceedings of this meeting, I had felt that I could neither take towards Mr. NOYES the position of those elder members of the profession who had been long and intimately associated with him upon equal grounds, nor yet could I take upon myself any longer the attitude of a representative of the younger bar. I feel, too, now, that there is no circumstance of his life, no feature of his character, no trait of his professional career that has not been accurately and yet applaudingly presented to our considera

tion. Yet I may venture to give, in a few words, some estimate, and the means of that estimate, that I have formed of Mr. NOYES' conduct and character in the profession. I can hardly remember, however, when I first became acquainted with him, either personally or in purely professional intercourse. When I came here as a student he was already established in a lucrative and prosperous business, which he pursued till the time of his death; and, as it came to my fortune, by some successful steps, to be raised in the competitions of the bar, I then met him, first as an antagonist, afterwards as an associate in causes. With all his general professional record (and the memory of all of us would probably assign to him as his principal service at the bar — as the most conspicuous departments of the profession in which he showed himself — that of an equity lawyer, or of an advocate for questions at bar, yet.) we all know that, in almost all the diversities of jury trials, involving the vast interests of this great community, he bore an elevated and almost, perhaps, an equally distinguished part as in the preparation and argument of equity causes; and I think that every one agrees that, whether observed with no interest in the case, or on either side in the contest — whether connected with him or against him — there never was a case, of all these diverse characters, into which he did not bring great service, and in which he did not gain even additional credit to that which he had enjoyed before.

Now, it has been said and truly said, Mr. NOYES' life was one of labor and care and attention, and that a good part of his distinctions and successes sprung from this; and Mr. President, in our profession, nay in all the useful careers of life, this is wholly true. God has given nothing to mortals in this life, of much value, without great labor.

Among the many great cases in which Mr. NOYES was employed, it fell to my fortune to be concerned in three — once as his associate throughout the long police law litigations, once opposed to him in the New Haven rail road cases, and again in the Rose will case. I do not think that our bar ever presented so singular a scene as the trial of the New Haven rail road cases, in which, speaking almost literally, Mr. NOYES was on one side and all the rest of us on the other. It was a wonderful trial of a man's resources and of his temper, for, when any one of us was exhausted on our side, there was always a fresh hand to take it up for us; but he was the constant combatter of all of us in succession, and stood — as in some of the ancient conflicts of physical force — like Horatius defending a bridge with his single arm against a host of adversaries. In the Rose will case, he brought to his side the

culmination of great researches and valuable ideas that he had collected in the doctrine of charitable uses. Under our statutory and constitutional laws, there was nothing he had not considered, and nothing that he did not know that was practically and substantially valuable in the doctrine of charitable uses. In the police litigations, from the first excitement until the final conclusion of the litigation that determined the title of the policemen, Mr. NOYES was constant in the service that he rendered to the side he had espoused, and perhaps more than any professional association which I enjoyed with him, I got the opportunity to see what he brought to his friends, and what aid or help he could give to or receive from his associates.

In all relations of life it has been my fortune to be on the same side, as we say, with Mr. NOYES. Though he was not a native of New England, yet he valued the privilege of membership with the New England society, which was confined, by its rules, to the son of a New England parent. He early sought that association, he faithfully adhered to it, and there was one admirable trait of Mr. NOYES' character, which perhaps but few knew of, and I should not have known still, but for my observing him in the counsels of that society, but which there attracted my attention. For a good while it had been desired that he should take the presidency of the society, but he had declined, upon his own suggestion that he thought it better that a native of New England should be at its head, — though he continued in a post of service in the society, which he maintained during the whole period, I believe, of my connection with the offices of that society, and that was the post upon its charity committee. He exercised steadily and faithfully, amid all the labors of his profession, the constant, sometimes tedious, sometimes annoying supervision of almoners of that charity. And always, at all the conferences connected with the business of the society, his cheerful interest, his constant perseverance in this department of duty, was conspicuous and admirable.

I may be permitted to say that there was something touching in his relations to this society, connected with his life and his death. He, as I have said, declined the presidency of the society, and it happened that the great misfortune of his life — the death of his son — occurred some years ago, upon the anniversary of the society — the 22d December. We were constantly desirous that he should attend our meetings and participate in its enjoyment, and give the grace and honor of his presence and his speech to the occasion. But he had, without any obtrusion of his grief, steadily declined, saying that that

day was not a day of joy for him. It was with great satisfaction that I heard, on the day before the last anniversary, that he had consented to assume its presidency, and that he was willing to be present at its feast. I heard — for I was not present — that on that occasion he made a speech so animated, so eloquent, so altogether admirable as to attract the attention of every hearer, as showing that he had the full force of his mind, of his genius, and of his affections; and the next morning, scarcely eight hours after, he lay with eye wholly dim, and his natural force wholly abated; his right hand had forgotten its cunning, and his tongue had cleaved to the roof of his mouth.

Mr. President, it is said that in our lives we do not pay the just measure of regard and esteem and attention to one another that would be right and proper; that we do not accord what is our due one to another, until

> "The sacred dust of death is shed
> Upon each dear and reverend head,
> Nor love the living as we love the dead."

This is true; and sometimes it is added that there is something of flattery, or at least of exaggeration, in these our views of the dead. I am not sure of this, Mr. President. I am not sure that the cross lights and the varying shadows give us so just an estimate of one another as the severe and serene twilight, after the sun has set and before the night of oblivion has swallowed us up. I believe there is more truth, as there is more affection, in these views and feelings that we express and experience for the dead.

Charles P. Kirkland, Esq. followed with appropriate remarks. After which the resolutions were unanimously adopted.

Samuel E. Lyon, Esq. moved that a copy of the resolutions be presented to the family of the deceased, and that the proceedings of the meeting be submitted to the court of appeals for entry on its minutes at the January term.

The motion was adopted.

At the opening of the Court of Appeals, at Albany, on the 10th day of January, 1865, Hon. B. W. Bonney, of New York, rose and addressed the court as follows:

"May it please the Court: Since the last term of this court the death of one has occurred, well known to all its members and to the bar of this state. In the sudden decease of WILLIAM CURTIS NOYES, the profession has sustained a loss, great and irreparable. With the intention of doing such honor to his memory as was justly due, the members of the bar of the city of New York held a meeting very recently which was largely attended, and, after passing resolutions expressive of their esteem and regard for the deceased, and of sorrow at his loss, also resolved that their resolutions be presented to this court. In accordance with that resolution I now present and read these proceedings."

The above proceedings having been read by Judge BONNEY, he moved that they be entered on the minutes of the court.

Hon. GEORGE F. COMSTOCK rose and said:

"May it please the Court: I take a pleasure, mingled with the sadness due to the occasion, in rising to second the motion which has been made, that the proceedings of the New York Bar be entered on the minutes of this Court.

Our deceased friend and brother was one of the most honored practitioners at this bar. It is here that the highest and best efforts of his professional life were put forth. It is here that his most valuable triumphs were achieved, and it is here that his ripe learning, his varied accomplishments as an advocate, not less than his excellence and worth as a private citizen and christian gentleman, should receive the commemoration which they so well deserve.

Among the recollections of his professional career, which press upon me at this moment, there is one which is peculiarly suitable to be mentioned here. Probably the most difficult and important legal controversy in which he was ever engaged, was the celebrated "million and half million trust" cases. Indeed, a controversy more important in the stake involved and the principles concerned has rarely arisen in this country. Mr. NOYES, I think, was in charge of the cases from their origin. After being litigated for many years in the subordinate courts, they were brought to this court for final adjudication, now precisely eight years ago, and occupied its exclusive attention for nearly thirty days. It happened to me, in another situation, to be present and to listen to that discussion, and I remember it as the highest intellectual satisfaction which I ever enjoyed. Those of your honors then on the bench, I think, will agree with me that this hall never witnessed an equal display of forensic power. On one side

were the consummate learning, the massive logic, and the keen discrimination of the ex-jurists BRONSON and BEARDSLEY — men who had adorned the bench of this state. With them was NICHOLAS HILL, whose powers of argument were rarely, if ever, overmatched.

Opposed to these great antagonists were O'CONOR, BUTLER and KENT. With them was our distinguished friend, whose sudden departure from the scene of his earthly labors and triumphs we now deplore. Of him it is but the simple truth to say that he was, if not *primus inter pares*, at least the worthy and equal associate antagonist of the eminent men whom I have named.

How fleeting and transitory are earthly excellence and greatness! Of all that noble array of talent and learning, only one survives — the rest have gone to their kindred dust. They have sunk to that slumber which will know no waking until the morning of the resurrection, when they and all of us shall be summoned by the trumpet of the archangel to a higher bar, where perfect justice, let us hope, will be blended with mercy through the Redeemer of mankind.

I have known Mr. NOYES during nearly the whole of my professional life. He had the discriminating mind, the patient industry and untiring devotion to the interests committed to his charge, which are better than the highest gift of mere genius. With those qualities he rose to the first rank, and practiced in the highest walks of his profession, and has left behind him a bright example as worthy of emulation, and it is encouraging to all those who commence the struggle for honorable fame.

Although I knew him long and well, others, doubtless, enjoyed more intimate relations with him. During the last three years of his life we were associated in causes of difficulty and importance, and no one can be more impressed than I am with the loss which our profession and society have sustained by his death. His eminence as a severe and able lawyer was softened by the uniform courtesy and amenity of his manner, and illuminated by the radiance of his private and domestic virtues.

Viewing, as we did, from different stand points, the great social and political questions which agitate the public mind in this country, and are ever shaking our pillars of government and society, I cheerfully accorded to him all the sincerity and earnestness of intelligent conviction. He himself was far too cultivated, too wise and just to be intolerant toward the like convictions of other men. It is among the highest satisfactions permitted to me to believe that I enjoyed his friendship as I gave to him unrestrainedly my own."

Chief Judge DENIO said:

"When the judges who sat on the bench of this court the last year met in consultation last month, and heard of the sudden death of Mr. NOYES, they felt not only that one of the great lights of the law had been extinguished, but that each one of them had lost a personal friend. I am authorized to say that those who took their seats here at the commencement of the present year, fully sympathize in the sorrow universally felt for our great loss. For myself, the blow was peculiarly afflicting.

I had known Mr. NOYES longer than any member of the bar or the bench, and had known him intimately and well. More than forty years ago we were successively students with HENRY R. STORRS, a person of great genius and one of the most brilliant lawyers of his time, but whose name, alas, (such is the transitory value of professional renown,) is almost effaced from the memory of the younger members of the bar. As I left Mr. STORRS' office, on my admisssion to the bar, Mr. NOYES succeeded me, and my first professional partner, on his admission to the bar, became his. When I removed to Utica, he also came there and practiced law for some time in that city, and then, twenty-five or thirty years ago, he left Utica for the city of New York.

It is most gratifying to be able to say that during that long period of time our relations have been intimate and confidential, and that no single shade of difference, or even coldness, has ever intervened.

The loss, therefore, was a peculiarly afflictive one to me, and it is deeply lamented, both upon personal and public grounds.

When a great man is taken away from us, we are apt to inquire as to the predominating characteristics of his mind. Of Mr. NOYES it may be said that, although gifted with talents of a very high order, he had none of the irregularities and eccentricities of genius. There was a remarkable harmony in his intellectual powers, and in his habits of thought and conduct.

His intellectual efforts were not fitful and intermittent, but steady and persistent, and he gave to every thing its proper place — professional efforts, domestic duties, attention to his friends and devotion to his duties as a citizen — none were in excess; all were illustrative of the remarkable harmony of his life and character, and showed that if he did not possess an exalted imagination, or the qualities which are supposed to define a man of genius, he yet possessed, in great perfection, those perhaps more useful qualities which lead to eminence in a learned profession.

He had a remarkable tenacious memory. Propably he never read a case or examined a subject without retaining such a recollection of it as would enable him to call up and apply it when he subsequently had occasion for its use. But without going further, I need but say, that born and bred in the country, he went to the metropolis without family connections or any adventitious aid, he successfully encountered the immense competition which he necesarily met, and very soon took his place in the front rank of the profession.

In our profession eminence is the result of labor and ability, and is not attained by accident or the caprice of fortune. It is enough to say of him that in a strange city he reached an eminence and achieved a renown which few have attained.

The only remark which could be made of Mr. NOYES, which was not altogether laudatory, was, that he persisted in his arduous labors to the detriment of his health; and it was a matter of concern to his friends, that having acquired a large competency as the reward of his professional life, and as great a measure of fame as falls to the lot of the most favored, he should not have taken the repose to which he was so justly entitled. He probably felt the noble sentiment of Sir FRANCIS BACON, "that the duties of life are more than life," and so he labored on, not feeling authorized to abandon the work cast upon him by the solicitude of his clients; and it is enough to say he conscientiously pursued the cause of duty and usefulness until it pleased God to call him from us.

In a time like this, we dwell with peculiar satisfaction upon his christian character, which was exemplary in the highest degree. In the midst of his most active life he never forgot his dependence upon the great Author of his being. He has left not only a great name in his cherished profession, but what is better, the repute of an honest and a conscientious christian man.

The clerk will enter the proceedings of the New York bar in his minutes."

INDEX.

A

ACCOUNT.

1. C. owed J. A. upon an account, and gave his note for a part of it, promising to pay the balance within a specified time. J. A. subsequently transferred the whole account, together with the note, to the plaintiff, by parol. *Held* that the delivery and acceptance of the note were some evidence of the demand, sufficient to make the transfer good as between the parties, although the consideration amounted to fifty dollars. *Armstrong* v. *Cushney*, 340

2. But that it would not be assumed, without proof, that the consideration amounted to that sum. *ib*

3. Since the code of procedure, the assignee, in such a case, has his election to sue in his own name, upon the note, or upon the original indebtedness. And when he sues upon the original demand, it is sufficient for him to produce and surrender the note upon the trial. *ib*

4. Where, however, there is a transfer of the note without a contemporaneous transfer of the account for which the note is given, the account, *it seems*, is extinguished. *ib*

See CORPORATION, 4.

ACTION.

1. Where several legatees, entitled to a sum of money bequeathed to them in equal shares, join in a power of attorney to another, authorizing him to collect for them their respective legacies, each legatee may maintain an action in severalty, against the attorney, to recover the amount of his legacy. *Power* v. *Hathaway*, 214

2. Such an action is maintainable without any previous demand. *ib*

3. A suit in equity against supervisors of a county, to restrain them by a perpetual injunction from imposing a tax which will be a lien upon the plaintiffs' lands, and a cloud upon the title thereto, can not be sustained upon the ground that it will prevent a multiplicity of suits, where it does not appear that any one has sued the plaintiffs, or threatened to sue them in respect to such tax. *Mayor* v. *Cutler*, 239

4. In such case, if the proceedings to levy and impose the tax are illegal and invalid upon the face of the record, a single action at the suit of the people, upon a common law certiorari, after the proceedings of the supervisors to levy such tax are completed, will bring up the whole proceedings for review, when they can be reversed, or set aside and quashed. The persons whose lands are subject to the tax can also defend themselves, in a suit at law against them, and the proceedings will not constitute an apparent cloud upon their title. *ib*

5. Nor is it a ground for equitable interference that the proceedings to

impose the tax are, or appear to be, fair and valid upon their face, and that extrinsic facts are necessary to be proved in order to establish the invalidity of bonds issued by the supervisors in pursuance of the resolution for the levying of the tax, which can not be brought before the court on a writ of certiorari. *ib*

6. The maker of a promissory note paid $100 thereon, to the payee, who omitted to indorse or give credit therefor, but sued the maker and surety, and recovered judgment for the full amount of the note, the suit not being defended, and issued an execution thereon; whereupon the surety paid the judgment, and taking an assignment of the principal's claim, brought an action to recover back the payment of $100. *Held* the action would not lie. *Binck* v. *Wood*, 315

7. The law will not uphold the faith and trust that allow a man when sued upon a note, to lie by and rest upon the belief that the plaintiff will not do what he has notified the defendant, in the summons and complaint he will do—viz. take judgment for the whole amount of the note, without crediting a previous payment—and then bring an action to recover back a part of the judgment recovered, on the ground that his just confidence has been betrayed. *ib*

8. Where one leases premises to another, covenanting to keep the buildings in repair, and in consequence of his neglecting to repair the same, a shed falls, drawing down with it a building of an adjoining proprietor, and injuring the property of the latter therein, an action will lie against the lessor, to recover the damages. *Benson* v. *Suarez*, 408

9. When a county is to be sued, the action must be against the board of supervisors, and not against the individual members. *Mayor* v. *Cutler*, 239

See Account, 3.
Agreement, 3.
Banks and Banking, 1.
Corporation, 6, 8, 10, 11.
Landlord and Tenant.
Malicious Prosecution.
Municipal Corporations, 1.
Parties, 1, 2.
Referees.
Sheriff, 4.
Taxes and Assessments, 7.

ADMINISTRATION.

No guardian of an infant *who is not a residuary or specific legatee*, is entitled to letters of administration with the will annexed, in preference to the widow of the testator. *Cluett* v. *Mattice*, 417

AFFIDAVIT.

See Insolvent Debtors.
Summary Proceedings, &c.

AGENT.

See Broker.
Principal and Agent.

AGREEMENT.

1. The plaintiff and defendants entered into a written agreement by which the former agreed, for a certain sum to be paid him by the latter, to do all the carpenter's work upon a school house to be erected, and to furnish and use all the requisite materials; and that he would commence said work, and would "proceed therewith, without delay, and in such a manner as not to delay the contractor for the mason work." *Held* that this latter covenant raised an implied obligation on the part of the defendants to have the building in readiness for the plaintiff to perform the condition. *Allamon* v. *The Mayor, &c. of Albany*, 33

2. *Held*, also, that this was a mutual covenant, of both the parties: on the part of the plaintiff that he would commence and proceed at once, and on the part defendants that they would be ready to allow him to do so. *ib*

3. And that the plaintiff having sustained damage by reason of the de-

fendants' delay in having the building ready for him to do the work stipulated, he could maintin an action to recover the amount. *ib*

4. *Held*, further, that the plaintiff did not waive the defendants' breach of the contract, by going on, without complaint or objection, and completing the work. That he had a right to proceed with it, after the breach, and compel the defendants to pay the increased expenses incurred by reason of the delay. *ib*

5. And that an action to recover such increased expenses might be maintained upon a *quantum meruit*, independent of the contract. *ib*

6. *Held*, also, that the plaintiff having been delayed in the performance of his contract by the act or omission of the defendants, until wages were higher, and the prices of materials increased, he was entitled to recover the additional amount he was obliged to expend, in completing his contract. *ib*

7. Contracts were entered into between the plaintiff and defendants, dated respectively October 17, and October 26, 1861, by the first of which the plaintiff agreed to deliver to the defendants 1000 tons of hay at $10 per ton, and by the second he agreed to deliver from 300 to 500 tons at $11 per ton. The hay was to be delivered at Albany, and to be good, merchantable, shipping hay, in good order, in bales averaging 300 pounds. Hay was delivered to, and accepted by, the defendants' agent at Albany upon these contracts. The defendants insisted that a considerable portion of the hay so delivered was not of the quality provided for by the contracts. *Held* that the question as to what was included in or excluded from the terms employed in the contracts was open to evidence for the purpose of showing what was intended by the use of the terms employed. *Fitch* v. *Carpenter*, 40

8. *Held*, also, that there being a question of fact involved, whether the hay delivered was of the quality which the contracts called for, in regard to which there was a conflict in the evidence, and which question had been decided by the referee, his decision was final. *ib*

9. *Held*, further, that the plaintiff having delivered the hay, at Albany, according to the conditions of the contracts, and the defendants having accepted it with a knowledge of a deficiency in the weight of the bales, and without objection, at the time, they had waived a right to urge that the hay did not conform to the contracts, and to claim a deduction from the price on that account. *ib*

10. And that it was competent to show that the defendants had waived the provision in the contracts, requiring the bales to average 300 pounds each. *ib*

11. Where a contract is made for the sale and delivery of two different parcels of goods, to arrive in different ships, at different periods of time, each portion of the contract is complete in itself, without reference to the other. *Swift* v. *Opdyke*, 274

12. Though the parties may, by express terms, make such a contract, not only one and the same but also indivisible, yet if nothing of the kind appears, showing that the time of payment is to be deferred until the delivery of all the goods, it will not be assumed that the two distinct parts of the contract were intended to be dependent on each other. The implication must be plain and unmistakable, to justify such a conclusion. *ib*

13. Whether such a transaction be deemed one and the same contract, and yet divisible, or whether it be deemed two distinct and separate contracts, the delivery of a portion of the goods will take the claim for the value of that portion out of the statute of frauds. *ib*

14. In the one case, it will amount to a part performance, and in the other to an entire performance of the contracts, the acceptance of a portion of the goods being a waiver of the whole. *ib*

15. It is well settled that an agreement by a creditor with a third person to accept less than his

demand in satisfaction of it, is valid and may be enforced. *Babcock* v. *Dill*, 577

16. The plaintiff, while in the employ of the defendant, and working upon his farm at a specified sum per month, including his board, married the daughter of the defendant, who was then residing with her father, as a member of his family. She continued to reside with, and render services for, her father, being his principal housekeeper; and he furnished her and her two children — issues of the marriage — with food and clothing; without any agreement or understanding, or accounts kept, touching the services of the daughter and the food and clothing of herself and children. And the plaintiff continued to work for the defendant, and to board in his house. *Held* that the circumstances did not justify the implication of a promise by the defendant to pay for the services of his daughter, and a promise by the plaintiff to pay for the board and clothing of his wife and children. *Conger* v. *Van Aernum*, 602

17. That the claims touching the wife and children should be considered together; and that the plaintiff was not entitled to any thing for the services of his wife, nor was the defendant entitled to anything for the food and clothing of the wife and children. *ib*

18. *Held, also*, that the parties having agreed, in March, 1852, for the services of the plaintiff for eight months, at $12 a month, and he having continued to labor for the defendant until March, 1860, without any other agreement being made as to the amount of his compensation, a promise by the defendant to pay what the plaintiff's services, after the expiration of the eight months, were reasonably worth, might be implied. *ib*

19. And that the relation between the plaintiff and defendant was not such as to negative the presumption that compensation was expected and intended, by both parties. *ib*

20. But the statute of limitations applied to all wages that became due to the plaintiff more than six years prior to the commencement of the action. *ib*

See DEBTOR AND CREDITOR, 1 to 5.
MORTGAGE, 5.
MUNICIPAL CORPORATIONS, 5, 6.
PARTNERSHIP, 1.
SPECIFIC PERFORMANCE.

APPEAL.

1. The erroneous dismissal of a suit by a justice of the peace, against the remonstrance of the plaintiff puts an end to it, as effectually as though it was dismissed upon the plaintiff's motion. *Lord* v. *Ostrander*, 337

2. An appeal from the judgment of dismissal will not restore the action, so as to allow the plaintiff to interpose its pendency as a bar to a suit subsequently commenced by the defendant to recover a demand which he was required to avail himself of as a set-off against the demand of the plaintiff before the justice. *ib*

3. Where, however, the county court, upon a reversal of the judgment, may award a new trial, either before the justice or in the county court, the suit, *it seems*, is not determined pending an appeal to the county court, as to any matter in issue, or which is required to be put in issue in such action. *ib*

See COSTS.
HIGHWAYS.

ARREST.

1. In an action for a willful and wrongful injury to the plaintiff's property, and for wrongfully and willfully depriving her of the use of certain parts thereof, the defendant is liable to be arrested and imprisoned upon execution. *Niver* v. *Niver*, 411

2. The extent of the right of a citizen to arrest another is when a felony has been committed in his presence. *Trask* v. *Payne*, 569

See ORDERS OF THE WAR DEPARTMENT.

ASSESSMENT.

See CERTIORARI, 7, 8.
NATIONAL BANKS, 5 to 10.

ASSIGNMENT.

For the benefit of creditors.—*See* DEBTOR AND CREDITOR, 6 to 11.
WRIT OF PROHIBITION, 4, 5.

See ATTORNEY.
SET OFF.

ASSIGNOR AND ASSIGNEE.

See ACCOUNT, 3.

ATTACHMENT.

Against Property.

1. To render a seizure of property under process effectual, it must be accompanied by possession. The sheriff must not only seize, but he must take the property attached into his custody. In case of neglect to perform his duty in this respect, the sheriff is subjected to personal responsibility. *Smith* v. *Orser*, 187

2. Upon an attachment being issued against one or more members of a firm, the sheriff must proceed to serve it upon the interest of the defendants in the attachment in property owned by them jointly with others, in the same manner that he is required to do under an execution. *ib*

3. Inasmuch as the law requires the sheriff, upon an attachment, to take the property into his custody, the spirit of section 207, sub. 4, of the code must be considered to forbid the use of the provisional remedy for the claim and delivery of personal property in such a case, notwithstanding the attachment upon which the property was taken was not against *the plaintiffs*, literally, but only against *some of them*. *ib*

As a Provisional Remedy.

4. An attachment can not issue as a provisional remedy, under section 227 of the code, in an action of trespass for taking and carrying away personal property, the claim being for damages not ascertained, but to be assessed by a jury. *Shaffer* v. *Mason*, 501

See SHERIFF, 3, 4, 5, 6.

ATTORNEY.

1. An assignment made by a party to his attorney, of a verdict and the judgment to be entered upon it, to pay the attorney for his services and disbursements in the action, is upon a good and valid consideration. *Mackey* v. *Mackey*, 58

2. After a verdict for the plaintiff, in an action for a personal tort, but before judgment, the plaintiff assigned the verdict, together with the judgment to be entered upon it, to his attorney, in payment for his services and disbursements: *Held*, that the assignment had the effect to transfer the verdict, and the judgment when entered, to the assignee; and that the latter had not only a prior but a superior equity to that of the defendant claiming a right to set off a judgment previously recovered against the assignor. *ib*

See ACTION, 1.

B

BANKS AND BANKING.

1. On the 1st of June, 1857, the plaintiff had in deposit in the bank of which the defendant was the president, the sum of $8000 in cash. The bank also, at the same time, had in deposit and for collection, in behalf of the plaintiff, a note for $2000, made by G., the cashier. On that day the plaintiff, being then at the west, wrote to G. enclosing his check on the bank for $2000, for which he desired G. to remit to him two drafts on New York, for $1000 each. He also requested G. to forward to B. at La Crosse, three drafts, in all amounting to $2000, and apply the same on his (G.'s) note then held by the bank and past due. The two $1000 drafts were sent to the plaintiff, accordingly, and on the 25d of June, G.

transmitted, by mail, to B. the three drafts, amounting to $2000. G., however, instead of applying the $2000 upon the note made by him, charged that sum to the account of the plaintiff, on the books of the bank, notwithstanding he (G.) had to his credit, in the bank, a sum sufficient to make good the amount of the drafts. And he did this with the knowledge of the president, who was aware of the plaintiff's instructions, and cognizant of all the facts. The plaintiff was not informed by G. that the amount of the drafts sent to B. had been charged to the plaintiff's account, but received and parted with the drafts as so much money paid upon G.'s note; and when he learned that his instructions had been violated, he repudiated the transaction, and demanded the $2000 from the bank. *Held*, that an action would lie, by the plaintiff, to recover from the bank the $2000 so charged to his account by G. *Reynolds* v. *Kenyon*, 585

2. *Held, also*, that the plaintiff having received the money, or its equivalent, without any suspicion that it was not a lawful appropriation of funds belonging to G., or which he had applied with the full knowledge and approbation of the bank, if G. obtained such funds improperly and by an act which, as between him and the bank, could be esteemed and treated as fraudulent, the loss should fall upon the party who had put G. in a position to perpetrate a fraud, and constituted him the apparent owner of the money. *ib*

3. *Held, further*, that G. being the financial officer of the bank, clothed with power, as to outside parties, to draw drafts and to appropriate its funds, in all matters falling within the apparent scope of his authority, his principal was bound by his acts within that limit, as to all persons dealing with him in good faith. *ib*

4. Such persons are not bound to inquire into facts *aliunde*; the apparent authority is the real authority. *ib*

See NATIONAL BANKS.

BILLS OF EXCHANGE.

1. The payee of a draft, being in possession of it, is presumed to hold it for his own use and benefit, and the draft imports a debt due from the drawees to the drawers, which is assigned to the payee. *The Trader's Bank of Rochester* v. *Bradner*, 379

2. The plaintiff, being the holder of nine drafts, amounting in the aggregate to $21,000, which it had previously discounted, and which were near maturity, L., the drawer of some of them and the indorser of others, transferred to the plaintiff, as collateral security for the payment of said nine drafts, a draft on L., S. & Co., for $17,000, made by B. & Co., payable subsequently to the maturity of each of the nine drafts, to the order of, and indorsed by L. The plaintiff, in consideration of such transfer, expressly agreed that it would not sue the drawer or drawees, upon either of said nine drafts until the maturity of the draft of B. & Co. thus transferred. *Held* that this agreement for forbearance as to the nine drafts, was a valuable consideration, within the meaning of the rule protecting the holders of negotiable paper; and that the plaintiff was to be regarded as a holder for value, to the full amount of the draft of B. & Co. *ib*

See HOLDER.
PARTNERSHIP, 2.
PRINCIPAL AND SURETY, 2.

BOARD OF SUPERVISORS.

1. At a meeting of the board of supervisors of the county of L., on the 3d day of August, 1864, a resolution was adopted in pursuance of chapter 8 of the laws of 1864, authorizing the levying of a tax to pay bounties to volunteers, by which the county treasurer was authorized to issue the bonds of the county to the several supervisors, to pay bounties to recruits that should be mustered into the service of the United States to the credit of the respective towns, under the president's call of July 18, 1864, for 500,000 men. By another resolution of said board, passed on the

3d of September, 1864, each town in the county was authorized to increase its bounties to $1,000, and the treasurer was empowered to issue bonds to the respective supervisors at the increased rate. On the 16th of September, 1864, a draft was made to fill the quota of the town of G. under the said call, amounting to twenty-nine men, which produced nineteen men, who, after inspection, were accepted on such quota. On the 23d day of the same month a special town meeting was held, in said town of G., at which it was resolved to pay a bounty not exceeding $1000, and that the same be assessed and collected from the taxable property of said town. Subsequently, the supervisor of said town demanded and received from the county treasurer twenty-nine bonds for $1000 each, which were negotiated by him and the avails used for the purpose of procuring substitutes for the persons so drafted from that town. *Held* that the supervisor of the town of G. was duly empowered to receive from the county treasurer the bonds of the county, and to apply such bonds, or the proceeds thereof, in paying bounties to volunteers to fill the quota of the town; and that the draft, which took place on the 16th of September, did not render such use or appropriation of the bonds or the proceeds thereof unlawful by filling the quota of the town, so that no volunteers could thereafter be legally called for or required from said town. *Magee* v. *Culver*, 229

2. *Held, also*, that in respect to the manner in which the supervisor of G. procured volunteers to fill the quota of that town, the spirit and intent of the statute, and of the resolutions of the board of supervisors and of the town meeting, were fulfilled and complied with. *ib*

3. One who freely enlists in the place of another, and becomes his substitute of his own free will and accord, is a volunteer, within the spirit and intent of the statute. *ib*

See Action, 3, 4, 5.
Certiorari, 2.
County.
County Bonds.

BONA FIDE PURCHASER.

See Fraud, 6.

BOND.

1. A bond, for the payment of money, was executed by several persons at the same time, as sureties, upon the representation that another person, D. would sign it as a co-surety, and with the understanding that B. one of the obligors, was to take the bond, but was not to deliver or use it until after it was signed by D. It appeared that some of the obligors would not have signed the bond, except on this condition, and that they did not otherwise authorize its delivery. B. delivered the bond to the obligee without having procured the signature of D. thereto. *Held*, that there was no valid delivery of the bond; that it was incomplete, and the transaction was not consummated; and that the condition on which the instrument was executed not having been performed, the obligors were not liable. *The People* v. *Bostwick*, 9

2. *Held*, also, that this was not a case where the rule that when one of two innocent parties must suffer, he who has employed the agent, and enabled him to commit a fraud, should be the loser, rather than a stranger, was applicable; the plaintiff's occupying the position of one taking a security to which the party giving it had no title. *ib*

3. That if the rule of principal and agent applied, then the obligors would only be liable for such acts as they authorized. And the power given being conditional, and the condition on which its exercise depended not having occurred, and the delivery being entirely unauthorized, the principals were not bound. *President &c. Troy City Bank* v. *Bowman*, 339

4. A bond is not void for uncertainty, if it can be made certain by extrinsic facts. *ib*

5. A bond, conditioned for the payment of a specified sum, or so

much of said sum as shall remain unpaid on certain notes indorsed by the obligors and held by the obligees, after the application to the payment thereof of all net moneys received from the makers, or the collaterals accompanying the same, is not void for uncertainty *ib*

See COUNTY.

BROKER.

A broker or agent who undertakes to sell property for another for a certain commission when he finds a purchaser willing to purchase at the price, has earned and can recover his commission, though the sale was never completed, if the failure to complete the same was in consequence of a defect of the title, and without any fault of the broker or agent. *Doty* v. *Miller*, 529

BROOKLYN, (CITY OF.)

1. For the purpose of ascertaining whether particular property is situated within the city of Brooklyn, the line of low water, as the water flows in the East river after the land is reclaimed from the river or by the erection of wharves and piers and the filling in from the shore for that purpose, is to be deemed the dividing line between the cities of New York and Brooklyn. *Luke* v. *The City of Brooklyn*, 54

2. The jurisdiction of the city of Brooklyn must from necessity follow with the shore as it advances into the river or bay, whether the accretion proceeds from alluvion or artificial deposits and erections. *ib*

3. Piers and buildings which are taxed by the city of Brooklyn, must, in an action against the city, to recover the value thereof on their being destroyed in consequence of a mob or riot, be regarded as within the corporate limits and boundaries of Brooklyn. *ib*

C

CASES OVERRULED OR APPROVED.

1. The decision in *Brinckerhoof* v. *Phelps*, (24 *Barb.* 100,) reaffirmed and held to be decisive and controlling. *Brinckerhoof* v. *Phelps*, 469

2. The case of *Brooks* v. *Hanford*, (15 *Abb. Pr. Rep.* 342,) overruled. *Mackey* v. *Mackey*, 58

3. *Smith* v. *Weeks*, (26 *Barb.* 463,) overruled. *Brinck* v. *Wood*, 315

4. The decision in *Goll* v. *Hinton*, (8 *Abb. Pr. Rep.* 1,) approved. *Smith* v. *Orser*, 187

5. The decision in *Marsh* v. *Potter*, (30 *Barb.* 506,) approved. *Hooper* v. *Hooper*, 292

CERTIORARI.

1. The office of a writ of certiorari is to bring up, for review in the superior court, the record of an inferior court, or of a tribunal exercising judicial functions. It is not the office of the writ to bring up the proceedings of any other bodies or classes of public officers. *The People, ex rel. Dickinson*, v. *The Board of Supervisors of Livingston County*, 232

2. A board of supervisors, in passing resolutions to provide for raising money upon the credit of their county, for the use of said county, or upon the credit of any town thereof, for the use of such town, for the purpose of paying bounties to volunteers into the military or naval service of the United States, under the authority given by the act of February 8, 1864, (*Laws, ch.* 8,) are not acting in a judicial, but in a purely legislative capacity. *ib*

3. The supreme court can neither affirm nor reverse, or set aside, mere initiatory resolutions, of that character, or make any order in respect to them, upon certiorari. *ib*

4. A resolution passed at a town meeting, providing for the raising of money on the credit of the town, to pay bounties to volunteers, is not a judicial act, and can not be affirmed, or reversed or set aside, on certiorari. *ib*

5. A certiorari will not lie to bring up the incipient resolutions or proceedings upon which a tax may ultimately be based, before any tax is laid, or any final adjudication or determination is had upon the matter. *ib*

6. Inasmuch as a certiorari goes to review a judicial act—a consummated judicial decision—a proper return to such writ will bring up, as a part of the record, whatever entered into, or was necessarily passed upon, in the decision of the question sought to be reviewed. *Magee* v. *Cutler*, 239

7. A certiorari, to review an assessment made by the commissioners of taxes and assessments of the city and county of New York, will not lie after the assessment roll has been delivered by the commissioners to the board of supervisors, and the tax has been collected. *The People, ex rel. The Metropolitan Bank*, v. *Com'rs of Taxes*, 494

8. After the assessment roll has been delivered to the supervisors, the commissioners have no longer any control over the assessment, and can not correct or reduce it. *ib*

9. A certiorari will not be allowed, for the purpose of enabling a party, by procuring a reversal of the proceedings of the commissioners of taxes, to recover back, by action, money paid by him for taxes. *ib*

See TAXES AND ASSESSMENTS, 6.

CHARGE TO JURY.

See PRACTICE, 4, 5.

CHATTEL MORTGAGE.

Where a mortgage of chattels contains a power to the mortgagee in case of default in payment, to take the property and "to *sell* the same," and apply the avails in payment of the debt, and in case he shall at any time deem himself unsafe, that he may take possession of the property and "sell the same at *public or private* sale," previous to the day of payment, the mortgagee may, in case of default of payment at the day, sell the property at *private* sale, without notice to the mortgagor; and if such sale is fair and *bona fide*, the right of the mortgagor to redeem will be foreclosed. *Chamberlain* v. *Martin*, 607

CHECK.

See PRINCIPAL AND SURETY, 2.

COMMON CARRIERS.

1. The owner of goods suing a common carrier to recover damages for an injury happening to the goods through negligence, must give evidence sufficient to show that the goods were in a good condition when they came to the possession of the defendant, as a part of the evidence that they have been injured while in his custody. *Smith* v. *New York Central Rail Road Company*, 225

2. Merely showing the delivery of the goods by the carrier, in an injured condition, is not enough. It must be shown in what condition the carrier received them, in order to prove an injury in his hands. *ib*

3. This may be shown by direct affirmative evidence, or by proof of facts and circumstances from which the presumption of fact arises that the goods were in a proper condition when the carrier received them. *ib*

See RAIL ROAD COMPANIES.

COMPLAINT.

1. Counts for detaining the plaintiffs' property, and for wrongfully and negligently injuring it while in the defendant's possession as sheriff, may be joined in the same com-

plaint, where they arise out of the same transaction. If they do not, the defendant's remedy is to demur; and if he fails to do so, he waives the objection. *Smith* v. *Orser*, 187

2. Where the complaint in a foreclosure suit set out the indebtedness of the mortgagors upon notes indorsed by them and discounted by the plaintiff; and alleged that the mortgage was given to secure the payment of a bond by which the time for the payment of such indebtedness was considerably extended; and that the obligors had failed to comply with the conditions of the bond; *Held*, that these facts constituted a sufficient cause of action. *President of the Troy City Bank* v. *Bowman*, 639

See PRACTICE, 2.

CONDITION.

See BOND.
INSURANCE, 15, 16, 19, 20.

CONSIDERATION.

See ACCOUNT, 1, 2.
BILLS OF EXCHANGE, 2.
FRAUD, 3, 6.
HOLDER.

CONSTITUTIONAL LAW.

1. The act of April 13, 1855, "to provide for compensating parties whose property may be destroyed in consequence of mobs or riots," was a valid and constitutional act. *Luke* v. *City of Brooklyn*, 54

2. The duty and obligation of the state to provide for the safety of property against the destructive violence of mobs of lawless and riotous men, is too plain for a question; and the suplemental obligation imposed upon cities and counties to provide compensation for the injury or destruction of property which they could not, or would not, prevent, is but another application of the same principle of public duty. *Per* BROWN, J. *ib*

3. The 5th section of the act of congress, passed March 3, 1863, (*Statutes of* 1862 *and* 1863, *pp.* 756, 757,) so far as it provides for the removal to the circuit court of the United States, of any cause commenced in a state court against any officer, &c. for any arrest or imprisonment made, &c. by virtue or under color of any authority by or under the president of the United States, or any act of congress, after verdict and a trial and determination of the facts and the law, in the same manner as if the same had been originally commenced in such circuit court, is in violation of the 7th amendment of the constitution of the United States, and is for that reason null and void. *Patrie* v. *Murray*, 323

CORPORATION.

1. Although a corporation has no power, under the statute, to give any lien on its real estate, by its own act, a lien may be created, by operation of law, upon land purchased by it, in behalf of the vendor. *Dubois* v. *Hull*, 26

2. The plaintiff and several other persons, including some of the defendants, organized, a steamship company, by filing a certificate under the general law for incorporating steamship companies, and subscribing for the stock, applying the capital paid in to the building of a ship to carry freight and passengers between New York and Cuba. Subsequently a majority of the stockholders united together, as it was alleged, to frustrate the plan on which the ship was built, and to deprive the plaintiff of his rights. And some of the defendants, refusing to recognize the corporation so formed, and claiming the sole ownership of the ship, mortgaged her to M. They then organized a new company, by a different name, and caused the ship to be registered as belonging to the latter company, and to which company they conveyed the ship, and the company was about to issue stock to the defendants, to the exclusion of the plaintiff, for the value of the ship. It was alleged, and offered to be proved, that the defendants had sold the ship, to the government, and retained the proceeds. *Held*,

that the questions of tenancy in common, or of joint tenancy, or of part ownership, were not in the case; but that the plaintiff, as a *stockholder* of the first corporation, was entitled to equitable relief, at least as against those of the defendants who were officers or stockholders of that corporation, and who participated in the acts charged in the complaint, and the necessary effect of which was the destruction of his rights as such stockholder. *Dyckman* v. *Valiente*, 131

3. *Held, also*, that the plaintiff's complaint could not have been rightfully dismissed, even regarding him as a mere *creditor* of the first corporation. *ib*

4. *Held, per* LEONARD, J., That the plaintiff was *prima facie* entitled, as a *partner*, to an accounting from his fellow stockholders, as partners, for the value of the partnership property converted by them, and from which he was excluded. *ib*

nn

5. The secretary of a manufacturing corporation, in performing the services incident to the duties of his office, is a *servant* of the company, within the meaning and intent of the 18th section of the act of February 17, 1848, authorizing the formation of such corporations. *Richardson* v. *Abendroth*, 162

6. An action will not lie by one stockholder, against fellow stockholders, of a corporation, to enforce a personal liability for a debt of the company. *ib*

7. Though others may have a lien upon, or equitably own, stock in a corporation, the legal title is in, and the legal liability for debts of the corporation upon, him in whose name the stock is registered. *ib*

8. Where stock was hypothecated, by the owner, and afterwards assigned to trustees for the benefit of creditors, neither the pledgee nor the assignee taking a transfer upon the books of the company, or causing themselves to be registered as stockholders; *held* that the title still remained in the original holder; and that he could not sue his fellow stockholders, to enforce a personal liability for a debt claimed to be due him from the corporation. SUTHERLAND, J. dissented. *ib*

9. The visitorial powers conferred upon the court of chancery by the article of the revised statutes (*vol* 2. *pp.* 462. 463.) relative to proceedings against corporations in equity, can only be exercised by the supreme court on an application made at the instance of the attorney general, or of a creditor of the corporation, or of a director, trustee or other officer having a general superintendence of its concerns. *Howe* v. *Dead*, 504

10. An action can not be brought, under the statute, by a *stockholder*, against the corporation and its trustees, to have the corporation dissolved, and restrained from the exercise of corporate powers; to restrain the trustees from exercising any powers as trustees; and for the appointment of a receiver and the sale of the property of the corporation. *ib*

11. Nor can the court entertain such an action, or grant the relief asked for, under its general powers as a court of equity. *ib*

12. In no case, except in respect to moneyed corporations, or insolvent corporations, can a stockholder have a receiver appointed, on a preliminary injunction, with authority to take entire possession of the corporation, and thereby work its dissolution. *ib*

13. Yet, on the application of a stockholder, charging fraud against some of the trustees or directors, *it seems*, such directors or trustees may be restrained by injunction from committing any such fraudulent acts as are charged. But such injunction should apply only to the particular acts complained of, and not to the general business of the corporation. *ib*

COSTS.

The plaintiffs recovered a judgment in a justice's court for $140, damages and costs. The defendant ap-

pealed to the county court, stating in his notice of appeal, as required by § 371 of the code of procedure, as amended in 1862, the particulars in which he claimed that the judgment should have been more favorable to him, viz. that it should have been in his favor for no cause of action, and for costs. No offer was made by the respondent, to allow the judgment to be corrected, in any of the particulars mentioned in the notice of appeal. The action was again tried in the county court, and the plaintiffs recovered a verdict for $58. *Held* that the appellant was not entitled to costs on the appeal, but the respondents were. *Wynkoop* v. *Halburt*, 266

COUNTER CLAIM.

See VENDOR AND PURCHASER, 11.

COUNTY.

1 A resolution of a board of supervisors, providing for the issuing of county bonds to each supervisor who may call for the same, to pay a bounty of a specified amount to each recruit that shall be mustered into the service of the United States, to the credit of their respective towns, is a provision to issue the bonds upon the credit of the county; and the bonds issued under it are a county charge, and binding on the whole county. *Magee* v. *Cutler*, 239

2. Such bonds, being issued under the authority of the board of supervisors, upon the credit of the county, are valid bonds of the county; and it is the right and duty of the board of supervisors to provide accordingly for their payment, as legitimate public debts of the county. *ib*

See COUNTY BONDS.
TAXES AND ASSESSMENTS, 7.

COUNTY BONDS.

1. Bonds issued by or under the authority of the board of supervisors of a county, to the supervisors of the several towns, in pursuance of a resolution passed by such board under the 8th chapter of the laws of 1864, for the purpose of paying bounties to recruits that shall be mustered into the service of the United States to the credit of the respective towns, are county bonds, and binding as such upon the county at large. *The People, ex rel. Rose*, v. *The Board of Supervisors of the County of Livingston*, 298

2. Two distinct methods of raising money are provided by the statute; one being to *borrow* it, and the other, to raise it by *taxation*. If a board of supervisors resolves to borrow the money required, it is authorized to borrow upon the credit of the county, and to direct the bonds of the county to be issued by the county treasurer, to each supervisor, or to borrow money on such bonds for each supervisor who may apply for the same, to pay a bounty to each recruit that shall be mustered into the United States service from the respective towns of the county. *ib*

3. The board of supervisors has no right to lend the bonds of the county to the towns, so as to create town debts. *ib*

4. County bonds, issued under the authority of the board of supervisors, for the payment of bounties, create a county debt, which can only be lawfully assessed upon the whole county. The board can not lawfully make an unequal assessment upon the several towns, to pay such debt. *ib*

5. Such bonds will not become town debts by force of any subsequent vote or resolution of the towns respectively, at special town meetings called for that purpose, but will remain county bonds, and be binding solely upon the body of the county at large. *ib*

6. Bonds having been issued by a board of supervisors, on the credit of the county, the board may properly and lawfully adopt a resolution directing that there be assessed, levied and collected upon the taxable property of the county an amount sufficient to pay the sums due thereon. *ib*

COUNTY JUDGE.

See HIGHWAYS.

COURT OF COMMON PLEAS OF THE CITY AND COUNTY OF NEW YORK.

See WRIT OF PROHIBITION.

COVENANT.

See AGREEMENT, 1, 2.
LANDLORD AND TENANT, 1.

D

DAMAGES.

1. In an action for the breach of a contract to convey lands, the true rule of damages is, the value of the lands at the time of the breach, and interest from that time. *Brinckerhoff* v. *Phelps*, 469

2. The decision in *Brinckerhoff* v. *Phelps*, (24 *Barb* 100,) reaffirmed, and held to be decisive and controlling. *ib*

See AGREEMENT, 3, 6.
DEATH BY WRONGFUL ACT, &c. 4, 5, 6.
MUNICIPAL CORPORATIONS, 7, 8.

DEATH BY WRONGFUL ACT, &c.

1 Where a passenger upon a rail road, a female, being ordered by an officer of the train, while the cars were in motion, in a dark and rainy night, to pass forward, in attempting to step from one car into another, fell between the cars and was instantly killed; *Held*, in an action brought by her administrator to recover damages of the rail road company, for her death, that the deceased was not so clearly guilty of negligence as to warrant the taking of the case from the jury, on that ground. *McIntyre* v. *New York Central Rail Road Co.*, 532

2. *Held, also*, that the evidence was sufficient to take the case to the jury upon the question whether the death of the intestate was caused by the defendant's negligence. *ib*

3. Where, in such an action, there is proof showing that the services of the deceased might have been of some value to her next of kin, a nonsuit should not be directed. *ib*

4. As the statute gives a right of action in such a case, nominal damages, at least, should be given, if such right is established at the trial. *ib*

5. Where it is apparent from the whole case that the plaintiff can in no event recover any thing but nominal damages, a new trial should not be granted on his application. *ib*

6. In an action by the personal representative of a person killed by the negligence of the defendant, the jury is not limited to mere nominal damages. The value of the services of the deceased, to her next of kin, is a question for the jury to determine. *ib*

DEBTOR AND CREDITOR.

1. Where the father of an insolvent son entered into a composition agreement with creditors to pay them forty cents on a dollar, which they respectively agreed to accept in satisfaction of their debts; *Held* that the payment of the same by the father to one of the subscribing creditors, and its acceptance by the latter, was a satisfaction of the entire demand, and might be pleaded as such by the son, in an action by such creditor to recover the residue. *Babcock* v. *Ihll*, 577

2. The agreement contained a condition that the same was to be void unless all the creditors signed it. It *seems* that a breach of the condition would not enable the creditor to maintain an action to recover the residue without first restoring what he had obtained under it. *ib*

3. Nor (*it seems*) could such creditor avoid the effect of the satisfaction

by showing that the principal debtor had been guilty of fraudulent representations to induce creditors to become parties to the compromise. But if the creditor desires to rescind in such case and prosecute the principal debtor, he must rescind in *toto*; and restore to the father what he has obtained of him under the agreement. *Per* MORGAN, J. *ib*

4. Where a third person, without the knowledge of the father or son, gave his own note on behalf of the son to one of the creditors, to pay an additional ten per cent to induce the latter to sign the agreement; *Held*, that the note was void, and did not impair the effect of the compromise. *ib*

5. The voluntary payment of such note by the son, after the execution of the compromise agreement, although with knowledge of its character, is not such a ratification of the fraud as to avoid the compromise. MULLEN, J. dissented. *ib*

Assignment in trust for the benefit of creditors.

6. Where in an action to set aside an assignment of property in trust for the benefit of creditors, the referee found as a fact that at the time of the execution of the assignment the assignor was in possession of all the property therein referred to, and had ever since continued in posses sion thereof; and that there was no delivery of it, or change in its possession; *Held* that this alone, in the absence of proof that the assignment was made in good faith, and without any intent to defraud creditors, authorized the conclusion of the referee, that the assignment was fraudulent and void, as against creditors. *Terry* v. *Butler*, 395

7. The parties to an assignment must be deemed to have executed it in view of the provisions of chapter 348 of the Laws of 1860, p. 594, which require that every debtor making an assignment in trust for creditors shall, at the date thereof, or within twenty days thereafter, make and deliver an inventory or schedule of his creditors and debts. *ib*

8. The inventory, although not prepared until several days after the assignment is executed, is of the same effect as if it was made on the same day. And when completed, it is to be treated as if it had been expressly referred to in the assignment, as a schedule thereafter to be made; and is to be regarded as a part of the assignment, so far as it designates the creditors and the amount and nature of their debts. *ib*

9. Hence it is not erroneous for a referee to find that debts embraced in the inventory are provided for in the *assignment*, although not expressly mentioned therein; and if such debts are of a fictitious character, the assignment is void. *ib*

10. When a partner absconds, he abandons the business of the firm, and leaves the management of the affairs of the partnership with the remaining members; and such act is to be construed as vesting in them full authority to do whatever is necessary to pay the debts and settle up the business of the firm. *Palmer* v. *Myers*, 514

11. Hence they may execute an assignment of the partnership property in trust, for the benefit of creditors, without the assent of the absconding partner. *ib*

See AGREEMENT, 15.

DEED.

See FRAUD. 1 to 6, 8.
LIMITATION.

DEMAND

Of rent. *See* SUMMARY PROCEEDINGS, &c. 2, 3.

DESERTERS.

See ORDERS OF THE WAR DEPARTMENT.

DESERTION.

1. Desertion is not a felony at common law. *Trask* v. *Payne*, 569

2. In England, the whole matter of desertion is the subject of statutory regulation; and in practice the jurisdiction of the offense is there wholly confined to the military courts. *ib*

3. Such is the rule in this country. And except in military law, desertion is legally unknown to the tribunals of this country. *ib*

DEVISEES.

1. Where executors have the power to sell the shares of infant devisees under the directions of the will, a court of equity has the power to control its exercise, when a sale is manifestly opposed to the interest of the devisee. *Martin* v. *Martin*, 172

2. A judge, acting as *parens patriæ*, can determine, from the facts proven, whether it is for the interest of the infant that his real estate shall be converted into *currency*. *ib*

DISMISSAL OF WRIT.

See APPEAL.

E

EJECTMENT.

See PARTIES, 2, 3.

ELECTION.

See ACCOUNT, 3.
PARTIES, 2, 3.

By widow—see *Sullivan* v. *Mara*, 523

EQUITABLE ASSIGNMENT.

See LIEN, 1.

EQUITABLE LIEN.

See VENDOR AND PURCHASER, 1, 2, 3.

EQUITY.

See DEVISEES.
PARTNERSHIP, 3.
SPECIFIC PERFORMANCE.

ESTOPPEL.

See FORMER SUIT.
PARTNERSHIP, 7, 8.
WILL, 6.

EVIDENCE.

1. In an action upon a subscription paper for the erection of an institution of learning, the question arose upon the evidence, as one of fact, whether the defendants had recognized the plaintiffs as the legal body authorized to proceed to erect the said institution, and to enforce his subscription, and entitled to regard him as requesting them to proceed with the work, upon the basis of the subscriptions, and had not waived all objection, if any existed, to the appointment of trustees. *Held*, that upon the assumption that there was evidence, upon that issue, sufficient to warrant the jury in finding against the defendant, the liability of the defendant was properly presented and submitted to the jury upon the question whether he had recognized the plaintiffs as duly organized and the proper authorities to collect and enforce his subscription, and had requested them to proceed in the construction of the edifice. *Wayne and Ontario Collegiate Institute* v. *Downey*, 220

2. And that in this view, evidence showing that the trustees, upon whose action the plaintiffs claimed to recover, were not elected at M. the place designated in the subscription, or at any other place, by the association in whom the power of election was vested, but that another board of trustees was elected at M., and that the plaintiff had not derived title to the subscription from or through the last mentioned trustees, or the association, was immaterial, and properly excluded. *ib*

See AGREEMENT, 10.
COMMON CARRIERS.
FORMER SUIT.
FRAUD, 3, 5, 7, 9, 10.
PARTNERSHIP, 4, 9, 10.
POWER.
PROMISSORY NOTES, 4.
RAIL ROAD COMPANIES, 4, 10.
WILL, 1.

EXCEPTIONS.

See PRACTICE, 1, 5 6.

EXECUTORS AND ADMINISTRATORS.

See DEVISEES.
SURROGATE.

F

FORECLOSURE SUIT.

See COMPLAINT.
JUDGMENT.

FORMER SUIT.

1. Evidence of the proceedings and judgment in a former suit is not admissible in a subsequent suit between the same parties, for the purpose of establishing the fact that the question involved in the latter suit had been decided in the former action before the justice, and that the judgment there was conclusive, and the controversy in the second suit *res adjudicata*. *Gage* v. *Hill*, 44

2. In order to render a judgment, on a fact or title distinctly put in issue, an estoppel, in another action between the same parties and their privies, in reference to the same subject matter, it is essential that the tribunal which passed upon the question in the former suit should have had jurisdiction. *ib*

FRAUD.

1. On the 6th of July, 1859, J. P. C., being indebted to the plaintiff, at the time, on a note past due, executed and delivered to E. C., his sister-in-law, a deed of certain premises then owned by him. On the 29th of September, 1859, E. C. executed and delivered to one H. a deed of the same premises. On the same day H. executed and delivered to A. C., the wife of J. P. C., a deed conveying to her certain lands in W., of which he was the owner. The only consideration for this last conveyance was the property deeded to H. by E. C., the two pieces being considered of about equal value. In March, 1861, the plaintiff recovered a judgment against J. P. C. upon the note, and an execution issued thereon was returned unsatisfied. *Held*, that in the absence of any explanation whatever to show the reason why, or how and in what manner, H. became connected with the affair, and why he executed a deed to A. C. for a piece of real estate without receiving any consideration from her, and only received, in exchange, a deed from E. C. of another piece of property, which formerly belonged to A. C.'s husband; and with no evidence to prove that A. C. ever paid a particle of consideration for the property conveyed to her by H., or that she had any means of her own; it was extremely suspicious upon the face of the transaction, that these conveyances should have been made, under such circumstances, and that A. C. should have thus acquired a title to, and she and her husband be in the possession of, real estate of the same value as that formerly owned by the latter. *Newman* v. *Cordell*, 148

2. And that J. P. C. and his wife, in an action brought against them by the plaintiff to have the deeds declared void as being in fraud of J. P. C.'s creditors, were called upon to explain the suspicious circumstances; and in the absence of a satisfactory explanation, a strong conviction was fastened upon the mind, difficult to be removed, that the whole affair was not *bona fide* and honest, but a mere cover to place J. P. C.'s property in the hands of his wife, so as to prevent its being reached by his creditors. *ib*

3. *Held, also*, that although the plaintiff was bound to establish a want of consideration, for the conveyances, he might do so by circumstances, as well as by positive evidence. *ib*

4. *Held, further*, that there was at least a fair question for the jury to determine, as to the intent of J. P. C.; and that if there was enough testimony to be presented to them, then their finding upon that question should not be disturbed. *ib*

5. And that although J. P. C. swore that there was no intention to defraud the plaintiff, or to prevent the recovery of any claim the plaintiff might have against him, his statement was not to be regarded as entirely conclusive or satisfactory. *ib*

6. That if there was no consideration in fact for the conveyance to E. C. and A. C. respectively, nor any evidence to that effect, then, as a matter of course, those grantees each had knowledge of the intention of J. P. C., and a fraudulent intent on their part must be presumed. And in that contingency neither of them was a *bona fide* purchaser, and was not in a position to rely upon a want of knowledge of the intention of J. P. C. *ib*

7. The absence of evidence which it is in the power of the party to produce is often as effective, in disposing of a case, as testimony of a positive character. *Per* MILLER, J. *ib*

8. Where conveyances are attacked for fraud, and there are many facts surrounding the case which cast suspicion upon the transaction, the defendants should be prepared to meet the allegations of unfairness; and if they fail to do so, the plaintiff will be entitled to the benefit of all the unfavorable inferences which may legitimately be drawn from their neglect, and the general features of the case. *ib*

9. The denial of a party charged with fraud, that there was any intention to defraud the plaintiff, can scarcely be regarded as anything more than an expression of the opinion of the party charged with the fraud, as to the character of the transaction, and his own estimate of it. *ib*

10. While the party alleging fraud is bound to prove his allegation, by sufficient evidence, it is not essential that it should be established by direct proof. Resort may be had to circumstantial and presumptive evidence. *ib*

11. The rule is well settled, that to make a conveyance fraudulent as to the grantor, fraud or fraudulent intent must be shown on the part of the grantee, as well as on the part of the grantor. *ib*

FRAUDS, STATUTE OF.

See AGREEMENT, 13, 14.

FRAUDULENT SALES AND CONVEYANCES.

See FRAUD.
VENDOR AND PURCHASER, 13.

G

GUARANTY.

See PRINCIPAL AND SURETY.

GUARDIAN.

See ADMINISTRATION.

H

HIGHWAYS.

Upon an appeal to a county judge from the decision &c. of a jury, certifying to the necessity of a private road, and from an order of commissioners of highways laying out such road, the county judge has authority to dispose of the appeal in the manner prescribed by statute in respect to public roads; which includes the power to ap-

point referees to hear such appeal. *West* v. *McGurn*, 198

HOLDER.

1. The holder of commercial paper, who has received it for an antecedent debt, either as a *security* for payment, or as a *nominal* payment, without parting with any security, property or other thing of legal value, or giving any new consideration, is not a holder for a *valuable* consideration. *The Traders' Bank of Rochester* v. *Bradner*, 379

2. If, however, he has paid value for the paper, or, on the credit thereof, has relinquished some available security or valuable right, or has expressly assumed some new legal obligation, he is a holder for value, although the paper is available to him as security for a pre-existing debt. *ib*

See BILLS OF EXCHANGE.

HUSBAND AND WIFE.

1. A trust for the benefit of an unmarried female, accompanied by a limitation of the income of the trust property to her sole and separate use, for life, free from the control or interference of any future husband, created prior to the acts of 1848 and 1849 for the more effectual protection of the property of married women, will prevent a husband whom she may marry subsequent to those acts, from acquiring, by the marriage, any vested rights, in the wife's lifetime, in or to her *savings from her income*. And those acts give to the wife the power to dispose of such savings, by will. *Ruben* v. *White*, 92

2. If she dies without having disposed of such savings, or of the property arising therefrom, by will or otherwise, her husband, on her death, will be entitled, in his marital right, to such savings or property. *Per* SUTHERLAND, J. *ib*

3. In order to charge the separate estate of a married woman with a debt, prior to the act of 1860, there must have been an intention to charge the same, stated in the contract itself, or the consideration must have been one going to the direct benefit of the separate estate. SUTHERLAND, J. dissented. *White* v. *Story*, 124

4. The subsequent promise of the married woman to pay the debt, out of her separate estate, will not supply the defect of proof in the original contract. *ib*

5. The furnishing of a supper, on the occasion of her daughter's marriage, will not be deemed a consideration going to the direct benefit of the separate estate. *ib*

See WITNESS.

I

IMPLIED PROMISE.

See AGREEMENT, 1, 12, 16, 18.

INFANTS.

See DEVISEES.

INJUNCTION.

See CORPORATION, 13.

INSOLVENT DEBTORS.

1. The omission of judgment creditors, on signing a petition for the discharge of an insolvent debtor, to add to their signature a declaration that they relinquish their judgments to the assignee to be appointed, does not deprive the judge of jurisdiction; but is a mere irregularity, which can be cured by attaching such relinquishments to the petition, afterwards. *Matter of Philips*, 108

2. A discharge granted by a county judge under the provisions of the revised statutes in relation to "voluntary assignments made by an insolvent and his creditors," (2 *R. S.* 15,) *held* void, where the peti-

tioner's affidavit annexed to his petition instead of stating that the petitioner had not disposed of or made over any part of his estate for the future benefit of himself or his family, as required by section 7, stated that he had not disposed of or made over any part of his estate for the future benefit of himself *and* family. *Merry* v. *Sweet*, 475

3. The total omission of a fact, necessary to be proved to confer jurisdiction upon an officer, will make all his proceedings void. *ib*

4. It *seems* the county judge has no authority to grant a discharge where a portion of the creditors omit to state the nature of their demands; or where the schedule of the insolvent omits to state the true cause and consideration of his indebtedness to certain of his creditors. *Per* MORGAN, J. *ib*

See VENDOR AND PURCHASER.

INSURANCE.

1. Where an agreement is made by the agent of an insurance company, for the renewal of a policy, nothing being said respecting the amount to be charged, the insured has a right to suppose the renewal is to be at the rate formerly paid. *Post* v. *The Ætna Ins. Co.* 351

2. Where an insurance agent is authorized under the previous dealings between him and the insured to change the premium on a renewal, in account, or to resort to an implied agreement for its payment, he may make a renewal on the implied promise to pay, as well as upon actual payment of the premium; notwithstanding a provision in the policy that no insurance shall be considered binding until the actual payment of the premium. *ib*

3. Although a policy, and the certificates of renewal, declare that they shall not be valid until countersigned by the agent, this will not exclude the power of the agent to bind the insurers by a parol agreement to renew. *ib*

4. So far as the exercise of his authority as agent is involved, it makes no difference that at the time of renewing a policy the period for which the policy was issued had expired. *ib*

5. The possession and use, by an agent, of an insurance company's certificates of renewal, together with the exercise of that authority in other instances, indicates that the power of renewing and continuing insurances has been conferred upon such agent. *ib*

6. If there is nothing in the case showing the agent to be confined or restricted, in the use of that authority, to cases where the policy renewed is still valid as an insurance, those who deal with him are authorized to presume that no such restriction or qualification exists. *ib*

7. Where an individual is authorized to accept risks, to agree upon and settle the terms of insurance, and to carry them into effect by issuing and renewing policies, on behalf of an insurance company, this is sufficient to constitute him a general agent for the company, at the place where his business as such agent is transacted; and he can as well exercise his authority of renewing and continuing a policy which has already expired, as by making and issuing a new one. *ib*

8. An agreement by parol to renew a policy does not, of itself, renew the insurance. But it imposes upon the agent the duty of doing whatever is necessary to effect a renewal of it. *ib*

9. An agreement of that nature, either expressed or implied, must necessarily precede the renewal of any insurance. A similar one must be made, to ascertain and determine the subject, term and rate of insurance, in all cases where policies are issued. *ib*

10. They are directly and necessarily within the employment and authority of the agent, whose business could not be carried on without the power to enter into them. And the law does not require them to

be in writing, in order to become obligatory on the parties. *ib*

11. Under the common law, a promise, for a valuable consideration, to make a policy of insurance, is no more required to be in writing than a promise to execute and deliver a bond, bill of exchange or negotiable note; and such is the general doctrine of the law, when no statutory enactment requires the contract to be in writing, to render it valid. *ib*

12. Where a parol agreement is made, by an agent, to renew a policy, the action should be in equity for its specific performance, or at law for the breach occasioned by the failure to renew the insurance. Either form can be adopted, with equal propriety. *ib*

13. Where the action is for a specific performance, the court considers the agreement which the party was under a legal obligation to make, the same as if made, and decrees the payment of the money which would have been payable under the consummated agreement. *ib*

14. Where the action is at law, for the damages arising out of the breach of the agreement, the relief obtained is the same. *ib*

15. Where service of notice and proof of loss are by the terms of the policy a condition precedent to the insurer's liability, such condition is not affected, in legal contemplation, by the fact that its non-performace was unproductive of injury. *ib*

16. Such a condition may be partially or wholly waived by the insurers. Such waiver may be express, or it may be inferred from circumstances. *ib*

17. Mere defects in the proofs served have often been held waived by an omission to insist specifically upon them, when it was in the power of the party to correct and supply the defects *Per* DANIELS, J. *ib*

18. If the underwriter intends to insist upon defects in the proof, he must notify the insured of that intention in time to afford him an opportunity to correct them. *ib*

19. Conditions precedent are waived by such conduct on the part of the party entitled to insist upon them as is inconsistent with the purpose to require the performance of them. And contracts of insurance constitute no exception to the rule. *ib*

20. Thus where the objection to paying a claim under a policy was not that the proofs were not served, but that there was no legal liability on the part of the underwriters, for the payment of the loss, their agent insisting that the policy had not been renewed, and that no agreement for its renewal had been entered into; that the insurance companies were not benevolent societies, &c.; *Held* that if the insurers had intended to resist payment on account of the failure to serve the preliminary proofs, the agent should have so informed the insured; it being still in time to make the proofs; and that failing to do so, he must be deemed to have waived any defect in the proofs. *ib*

21. Where the object of a release, executed by the insured and indorsed upon the back of the policy on settling the same with the company, seems to have been merely to secure the discharge of the debt mentioned in the release, and the surrender and cancellation of the policy creating it, and nothing beyond that, the general terms employed should be limited to that object, and not be so construed as to extend the release to claims arising under other policies. *ib*

22. The plaintiffs, being the owners of certain premises, leased the same to C. who, by the terms of his lease, agreed to pay the necessary premium to enable the lessors to keep the premises insured for their own benefit, to the amount of $5000. At the execution of this lease there was a policy on the property. When it expired, C. asked leave to change the company. He agreed verbally to keep the property insured, for the lessor, to the extent of $5000. He thereupon took out the policy in suit, insuring "his" (C.'s) build-

ing; "loss, if any, payable to L." one of the lessors, who was acting trustee of the property. *Held* 1. That the agreement of C. to keep the property insured for the lessors, to the extent of $5000, made him liable to the lessors for a breach of that agreement, and gave him an insurable interest in the property to that extent. 2. That if he had an insurable interest, the property was his for the purpose of indemnity, to the amount of his interest; and he could insure that interest. 3. That the plaintiffs were entitled, under all the facts in the case, to recover on the policy as insuring them. *Lawrence* v. *St. Mark's Fire Insurance Co.* 479

See VERDICT, 4.

INTEREST.

See PRINCIPAL AND SURETY, 1.

J

JOINDER

Of plaintiffs. *See* PARTIES, 1.

Of causes of action. *See* PARTIES, 2, 3.

JUDGMENT.

Assignment of to Attorney. *See* ATTORNEY.

Set off of. *See* SET-OFF.

Of Foreclosure.

1. Where a person, made a party to a foreclosure suit as having or claiming to have some interest in, or lien upon, the mortgaged premises accruing subsequently to the lien of the mortgage, appears and answers, setting up as a defense that the mortgagor was not the owner, or seised of the premises at the date of the mortgage, but that he, the defendant, was owner and in possession of the premises, and had so continued ever since; which claim is not tried before the referee, but by stipulation a judgment is entered, containing a provision that such judgment shall be without prejudice to any adverse title in such defendant, superior to the mortgage; the judgment of foreclosure, and the sale thereunder, will not be conclusive upon such defendant, as to the title of the mortgagor. *Lee* v. *Parker*, 611

2. But, in an action of ejectment brought by the purchaser at the sale under the decree of forecosure, to recover the possession, such adverse claimant may set up as a defense any right he had to the mortgaged premises, existing prior to the execution of the mortgage. *ib*

See FORMER SUIT.

JURISDICTION.

See INSOLVENT DEBTORS.
WRIT OF PROHIBITION.

JUSTICES' COURTS.

1. Where it appears, in an action before a justice of the peace, that the title to land is in question, and that such title is disputed by the defendant, the justice is prohibited from taking cognizance of the action, and is bound to dismiss it. *Gage* v. *Hill*, 44

2. If he proceeds in the suit, after it appears that the title to land is in question, and is disputed, his proceedings are without authority, and his judgment void, for want of jurisdiction. *ib*

See APPEAL.

L

LANDLORD AND TENANT

1. A covenant on the part of lessee, to pay taxes and assessments ordinary and extraordinary, is a covenant real, running with the land, and an action can be maintained on it, by the lessor, against an *assignee* of the lessee; but not against an

under tenant of the lessees, or against an *assignee* of such *under tenant*. *Martin* v. *O'Conner*, 514

2. In 1815, M. leased to the M. E. church, two lots of land for the term of forty years, the lessees covenanting to pay a specified rent, and to pay and discharge the taxes and assessments, ordinary and extraordinary. In April, 1837, the M. E. church granted and demised the lots to H. for eighteen years, being the residue of their term, H. covenanting, for himself and his assigns, to pay the taxes and assessments. In 1843 H.'s administrator sold and assigned to the defendant the last mentioned lease, to have and to hold the premises for and during the residue of said term of eighteen years therein mentioned, subject to the rents, covenants, &c. therein also mentioned. The plaintiffs succeeded to the title of the original lessor, M., and just before the termination of the original lease, in 1855, were compelled to pay an assessment laid upon the property. *Held* that though the lease by the original lessees, to H. was a lease of the whole unexpired term, yet as it contained a covenant on the part of H. to surrender up the possession of the premises to *his* lessors, at the expiration of the term, and also a covenant to pay the rent to his lessors and a provision giving his lessors a right of re-entry in case of non-payment of the rent, or a breach of any of the covenants, the case of *Post* v. *Kearney*, (23 *N. Y. Rep.* 394,) was in point to show that H. was the under tenant, and not the assignee of the original lessees; and that therefore no action could be maintained, either against him or his assignee, on the covenant by the original lessees to pay the taxes and assessments. *ib*

See SUMMARY PROCEEDINGS.

LEGATEES.

See ACTION, 1, 2.
SURROGATE.

LESSOR AND LESSEE.

See ACTION, 8.

LEX FORI.

The *lex fori* governs all questions arising under the statutes of limitations of the various states of this country. *Power* v. *Hathaway*, 214

LEX LOCI.

It is a settled principle of interrational law, that all suits must be brought within the period prescribed by the local laws of the country where they are commenced. *Power* v. *Hathaway*, 214

LIEN.

1. On the 29th of December, 1860, S. & Co., merchants at Manchester, wrote to G., H. & Co. of the same place, stating that they had instructed their New York house to hold the proceeds of the sales of certain goods for account of G., H. & Co., as security for the payment of their acceptances of B. & Co.'s two drafts for £5000 each, drawn as an advance against the above mentioned shipments. On the 11th of January, 1861, G., H. & Co. wrote to S. & Co. of New York, stating that they hand the latter the two acceptances for £5000 each, as advances on the goods, and which, according to an arrangement with the house of S. & Co. in Manchester, were to be held in trust for the payment of the said two acceptances. On the 29th of January, 1861, S. & Co. of New York wrote to G., H. & Co. acknowledging the receipt of their letter of the 11th which, they say, advises them of the acceptances, and indicates the goods to be held in trust for the payment of the acceptances; adding "all of which is in order." *Held*, that these letters did not create any specific lien upon or equitable assignment of, the goods mentioned therein, in favor of G., H. & Co., but amounted simply to a promise on the part of S. & Co., to hold the proceeds of the goods for their benefit. *Gibson* v. *Stone*, 285

2. And that if S. & Co. instead of selling the goods for cash and remitting the proceeds to G., H. &

Co. appropriated them to the payment of their own debts, the latter had no right to follow them into the possession of the creditors; it being merely a violation of a promise, for which S. & Co. were personally responsible. *ib*

See VENDOR AND PURCHASER.

LIMITATION.

See NEXT OF KIN.

LIMITATIONS, STATUTE OF.

1. A defendant in a personal action who is resident abroad can not avail himself of the statute of limitations of this state until he has returned to, and actually been a resident of, this state, and subject to process of its courts, for the period of six years. *Power* v. *Hathaway*, 214

2. Under our statute of limitations, the only question, upon its being set up as a defense, is whether the defendant has been within the state of New York, and amenable to process of its courts, for six years before the commencement of the suit. If so, the statute is a complete defense, except in case of the special disabilities specified in the 101st section of the code, in favor of plaintiffs. *ib*

3. Where the plaintiff and defendant, at the time of contracting the debt, were, and had ever since been, residents of the state of Michigan; *Held*, that the courts of this state could not give effect to the statute of limitations of the state of Michigan; and that the defendant, being a non-resident of this state, could not set up our statute as a bar. *ib*

See AGREEMENT, 20.

M

MALICIOUS PROSECUTION.

1. Where a creditor, having a lawful claim against his debtor for less than $4200, commenced a suit against him, in Canada, and upon an affidavit stating that the defendant was justly indebted to him in the sum of $6000, (which affidavit could not by the laws of Canada be controverted,) caused a capias to be issued, upon which the defendant was arrested and held to bail in the sum of $6000, and being unable to procure bail to that amount he was imprisoned for about eighteen months; *Held* that an action for malicious prosecution would lie. *Brown* v. *McIntosh*, 344

MARRIED WOMEN.

Under the married woman's acts, of 1848 and 1849, a married woman has capacity, notwithstanding her coverture and irrespective of the act of 1860 authorizing a feme covert to carry on a trade or business and protecting her earnings, to purchase a stock in trade, business and good will, by executing a mortgage on her own separate real estate, and to recover for work, labor and services done and performed, and materials furnished by her in the course of such business. *James* v. *Taylor*, 530

MAYOR'S COURT OF ALBANY.

The mayor's court of the city of Albany has power to grant new trials, or to set aside a judgment on the merits entered on the report of a referee. *The People, ex rel. Amos*, v. *Austin*, 313

MECHANICS' LIEN

See PARTITION.

MILITARY BOUNTIES.

See BOARD OF SUPERVISORS.
COUNTY.
COUNTY BONDS.

MOB.

1. The object of the notice required by the act "to provide for compensating parties whose property may

be destroyed in consequence of mobs or riots," passed April 13, 1855, to be given to the sheriff, was for the purpose of protection, only. *Schiellein* v. *The Board of Supervisors of the county of Kings*, 490

2. It was not intended to restrict the action against a city or county to such persons as shall give notice to the sheriff that their property is threatened and in danger from rioters, if such notice would be useless for the purpose of protection. *ib*

3. The statute should be so construed that if a party is informed of a threat, and have time to notify the sheriff, so that he can take all legal means to protect the property, then the omission to give the notice is fatal. *ib*

See BROOKLYN, (CITY OF,) 3.
CONSTITUTIONAL LAW, 1, 2.

MORTGAGE.

1 Where there are several mortgages upon the same premises, the one first recorded is presumptively the prior lien, and is entitled to the surplus moneys on a foreclosure and sale. *Freeman* v. *Schroeder*, 618

2. The burden is upon the holder of the junior mortgage, to overcome this presumption of law. *ib*

3. The date of the acknowledgment is not, standing by itself, evidence of a delivery of the mortgage; nor is even the record conclusive evidence of a delivery. *ib*

4. The presumption of priority between mortgages, arising from the record, may be overcome by proof that the mortgage first recorded was, by verbal agreement, between the mortgagor and mortgagee, not to become operative until the whole consideration was paid, and that the second mortgage was delivered and recorded before such payment. *ib*

5. An agreement between a mortgagee and a mortgagor, that the mortgage shall be second in order, as a lien, to another mortgage on the same premises, is valid between the parties, if made prior to the delivery of the mortgage; and the assignee of such second mortgage will have no greater right than his assignor possessed, to disturb the lien of the prior mortgage. *ib*

See SPECIFIC PERFORMANCE.

MUNICIPAL CORPORATIONS.

1. An ordinance passed by a municipal corporation must be made to conform, strictly, to the provisions of the charter. *Cowen* v. *The Village of West Troy*, 48

2. The charter of the village of West Troy required the trustees, whenever they should deem it necessary to make or repair any highway, street, &c. to give a notice of three weeks, in a newspaper, requiring the owners of lands to make the improvement, in such a manner, and with such materials, as the trustees should direct, within six weeks, under the supervision of the street commissioner, or that the same would be done by the trustees, and the expense charged upon the lot or lots, &c.; and in case of the neglect or refusal of such owner to make the improvement specified, within the time limited, the trustees were authorized to do the same, and assess the expenses upon the lots. On the 7th of December, 1855, the trustees passed an ordinance requiring the owners of lots affected by it, within six weeks, to cause a street to be pitched and graded opposite their respective lots; and that in case of neglect or refusal, the street commissioners should cause the work to be done and the expenses to be assessed upon the lots. On the 1st of January, 1856 — less than a month after the passage of the ordinance — the work to be performed under it was awarded to McG., and was subsequently done by him. The ordinance contained no provision prescribing the manner in which the work should be done, or what materials should be used; and there was no proof of publication of the three weeks' no-

tice provided for by the charter, and no delay of six weeks from the first publication of the notice, to enable the owners to perform the work themselves. *Held* that the proceedings under the ordinance were without authority and utterly void; and that as a necessary consequence no action would lie against the corporation, to recover for work and labor done under it. *ib*

8. *Held, also,* that the fact that the work was done under the direction of the street commissioner did not obviate the difficulty *ib*

4. And that a subsequent ratification of the contract, whether before or after the work was done, would not make the contract obligatory upon the corporation. *ib*

5. When the contract under which work is done for a municipal corporation is void, because entered into in violation of its charter, the contractor can not recover for the work in any form; neither under the contract nor upon the *quantum meruit*. *ib*

6. A person contracting with a municipal corporation is bound to see that the provisions of its charter have been complied with; and if he proceeds without doing so, he must take the consequences of his temerity or want of care. *ib*

7. In an action against a municipal corporation for negligence in the construction of a wall, in consequence of which the wall fell down and injured the plaintiff's mill, the damages recovered should be only for the actual injury sustained by the plaintiff, with interest from the time of the injury. *Ludlow* v. *The Village of Yonkers*, 493

8. If rent of the building injured is recoverable, it can only be for such time as was necessary to repair the premises and restore them to their usefulness. *ib*

9. *Perseus* that where a municipal corporation undertakes, though voluntarily, to construct a drain to receive the drainage from a street and convey it across the land of an individual, it is bound to do the work skillfully. *ib*

N

NATIONAL BANKS.

1. Where the articles of association of a National Bank, signed by all the original stockholders, and giving express authority to the directors to remove the president, have been transmitted to the comptroller of the currency, who has, on receiving the same, issued circulating notes to the bank, he will be deemed to have approved of the articles, and the directors will have the power to remove the president, even though the bank has never legally adopted any by-laws. *Taylor* v. *Hutton*, 195

2. It is not necessary that any by-laws should be adopted before a president may be chosen or removed, and another appointed in his place. *ib*

3. Section 11 of the act of congress, relative to national banks, authorizes the directors to remove the president of a banking association. *ib*

4. National banks created by the acts of congress of February 25, 1863, and June 4, 1864, are lawfully created, and are to be deemed and taken to be agencies created for the purpose of carrying on the operations of the federal government. *City of Utica* v. *Churchill*, 550

5. A tax on a stockholder, for the stock held by him in one of these banks, is a legitimate and proper subject of state or municipal taxation, and the stockholder is liable to be so taxed, under the laws of the state. *ib*

6. A tax upon a stockholder, for the stock held by him in a national bank, is not a tax on the bank, nor on its property, but is upon property held and owned by the stockholder, only, and in which the bank has no manner of interest. *ib*

7. The laws of the state, and not the laws of congress, are to furnish the

guide by which to ascertain whether the stock of the national banks can be taxed, and the place and manner of taxing them. *ib*

8. The stock of the national banks is personal property, and is therefore taxable under the first section of the New York tax law, which declares that all land, and all *personal estate* within the state, whether owned by individuals or corporations, shall be liable to taxation, &c. *ib*

9. Inasmuch as national banks can not be taxed on their capital, the stockholders are subject to taxation, on their stock, under the 14th section of the New York tax law. *ib*

10. But stockholders can not be lawfully assessed, in the ward or town in which the bank is located, when their residences are in other towns, or wards, or in other states. *ib*

See BANKS AND BANKING.

NEGLIGENCE.

See DEATH BY WRONGFUL ACT.
MUNICIPAL CORPORATIONS, 7, 8, 9.
RAIL ROAD COMPANIES, 1, 2, 4 to 10.

NEW TRIAL.

1. Where, in an action upon a promissory note, the defense was payment, and the defendant, being examined as a witness, testified positively to the payment of the note, and to the particular time, manner and place of payment, and the person to whom made; and the plaintiff, on a motion for a new trial, swore that this testimony took him by surprise; that he did not previously know how, when, or where, it was claimed that the note was paid; and it appearing that to meet and explain such evidence by countervailing testimony, at the trial, required time, to inspect entries and examine dates, &c.; and that since the trial it had been discovered that three witnesses would contradict the defendant's testimony, as to the fact of payment, on the day and at the place mentioned by him, and would testify to their presence, and to what did take place, on the day and at the place of the alleged payment; *it was held*, that this was a proper case for granting a new trial on the grounds of *surprise* and *newly discovered evidence*. *Parshall* v. *Klinck*, 203

2. *Held, also*, that the evidence offered to be given was material, going to the merits, had been discovered since the former trial, was not cumulative, and there was no laches in not discovering it before. *ib*

See DEATH BY WRONGFUL ACT, 5.
MAYOR'S COURT OF ALBANY.

NEW YORK, (CITY OF.)

1. The legislature, by an act passed on the 17th of April, 1860, constituted certain persons, therein named, commissioners to locate and erect, in the city of New York, a suitable building to be used as a court house, &c. with power to purchase the necessary grounds for that purpose; declared that the grounds and buildings so to be purchased and erected should be the property of the city; and required the board of supervisors of the county to levy by tax an amount not exceeding $50,000, for the purpose specified. The commissioners entered into a contract, on behalf of the city, with the plaintiff, for the purchase of a lot of land on which to erect the court house. *Held*, on demurrer, that in the absence of any acceptance of, or assent to, the act by the corporation of New York, the commissioners were not, by force of the act, the agents of the corporation, and had no power to bind the city by their contracts. *Van Valkenburgh* v. *The Mayor, &c. of New York*, 109

2. And that for the legislature to appoint agents to purchase property for the city, and at its expense, and without its consent, was an extraordinary assumption of power, to which the court could not assent. *ib*

NEXT OF KIN.

1. The words "next of kin," used *simpliciter*, in a limitation of personal

property by will or deed, without any thing in the context showing a different meaning, mean those of the *kindred* or *blood*, who take by the statute of distributions, in case of intestacy, including representatives, but excluding the widow, as such. *Slosson* v. *Lynch*, 147

2. And under such a limitation, such kindred, including those claiming by representation, will take according to the statute; that is, the shares or portions prescribed by the statute. *ib*

O

ORDERS OF THE WAR DEPARTMENT.

1. An order of the war department, touching the arrest and detention of deserters, and specifying the persons who are authorized to make such arrests, should be construed strictly, and with the precise limitations which it prescribes. *Trask* v. *Payne*, 569

2. Such an order should not be held to mean that the person named therein may perform the special duty conferred, as they might some others, by procuration or delegated authority. *ib*

3. It is a case for the application of the maxim *expressio unius est exclusio alterius*. *ib*

4. Giving authority, in such order, to *sheriffs* to make arrests, will not authorize *deputy sheriffs*, as such, to arrest deserters. *ib*

ORDINANCE.

See MUNICIPAL CORPORATIONS, 1, 2, 3.

P

PARTIES.

Joinder of Plaintiffs.

1. Freeholders and tax payers of a town, owning lands in severalty, but not having any common property, can not join in a suit in equity to restrain the collection of a tax assessed upon all the lands in the town. They have no common interest in the subject in controversy, to entitle them to join in the action. *Magee* v. *Cutler*, 239

Joinder of causes of action.

2. In an action against W. and C. to recover the possession of one undivided tenth part of one hundred acres of land, the defendants put in separate answers. C. did not set up, in his answer, that he occupied and was in possession of only a portion of the land; that his occupation and possession were exclusive and in severalty, and that W. was in the exclusive occupation and possession of the remainder. The answer of W. contained the necessary allegations to entitle him to raise the objection that the action could not be maintained against the defendants jointly, and that the plaintiff was bound to elect, at the trial, against which he would proceed. The referee found that the plaintiff had title, in fee, to one undivided tenth part of the one hundred acres of land described in the complaint; but that W and C. were not in the joint possession or occupancy of any portion of the land; that by a partition between themselves, W. took twenty acres and C. eighty acres thereof, and each entered into the exclusive possession of his share. *Held* 1. That C. had, by his answer, waived the objection that the plaintiff could not maintain the action against him and W. jointly, and that the plaintiff was bound to elect, at the trial, against which he would proceed. 2. That the defendants could not demur to the complaint on the ground that several causes of action had been improperly united, for the reason that it did not appear on the face thereof that several causes of action had been so united. 3. That the plaintiff was entitled to recover against C.; and that the referee erred in giving judgment in favor of C. 4. That there was nothing in the case to prevent the plaintiff from electing to proceed against W.; and that he might do so, on a retrial of the action. *Dillaye* v. *Wilson*, 261

3. The section of the revised statutes which provides that "when the action is against several defendants, if it appear on the trial that any of them occupy distinct parcels in severalty, or jointly, and that other defendants possess other parcels in severalty, or jointly, the plaintiff shall elect, at the trial, against which he will proceed; which election shall be made before the testimony in the cause shall be deemed closed; and a verdict shall thereupon be rendered for the defendants not so proceeded against," was not repealed by the code of procedure; but relates to the subject matter of the action, and is retained in force by section 455 of the code. *ib*

Defect of, how objected to.

4. An objection for a defect of parties — such as the non-joinder of a person as plaintiff — which is not apparent upon the face of the complaint, can only be taken by answer. *Conklin* v. *Barton*, 435

5. If the objection is not thus taken the defendant will be held to have waived it. *ib*

PARTITION.

1. A parol partition between tenants in common, accompanied by actual possession in accordance therewith, will bind the parties and those claiming through or from them. *Otis* v. *Cusack*, 546

2. And where, after such a partition has been made, the parties take separate possession of their respective portions, and one of them contracts with a mechanic to erect a dwelling house on his part, which is built, accordingly, the interest of the party so contracting is of such a nature as to make it the subject of a lien under the mechanics' lien law, although the title to the whole lot is in the co-tenant. *ib*

3. But the co-tenant, who is not a party to the contract with the mechanic, and has no interest in the work done, is not liable under the contract; nor is his share of the property subject to the builder's lien. *ib*

PARTNERSHIP.

1. B., L. & L. by an instrument dated July 1, 1860, reciting that they composed the firm of S. & Co., agreed that, as H. A. S. had loaned them $100,000, to be used as capital for the term of two years and subject to all the risks of their business, so far as the creditors of the firm were concerned, they would pay him interest at the rate of seven per cent and that as a bonus for the good will of the business (in which he had formerly been a partner) they would allow him, half yearly, one per cent upon the gross sales of the firm, "he having no interest in the commission guarantee, or profit and loss, and in nowise a partner or to be allowed to have any part or control in the business of the house." *Held*, that H. A. S. was not a partner with S. & Co., nor liable as such to creditors of the firm. *Gibson* v. *Stone*, 285

2. A partnership may be indebted to a member of the firm, and may bind itself to him by note or bill. And though the payee can not enforce the obligation at law, by reason of the technical legal rule that a man can not sue himself, yet he may have relief in equity; and his indorsee may recover at law. *The Traders' Bank of Rochester* v. *Brodner*, 379

3. In equity the separate estate of partners is not liable for partnership demands, until the partnership effects are exhausted and the separate debts are paid. *Terry* v. *Butler*, 395

4. An order appointing the plaintiff receiver of the property of B. a judgment debtor, was founded on a demand owing by P. & B. as co-partners. The property in the hands of their assignees, and which the latter were directed by their judgment to transfer to the plaintiff, was the separate property of B. The judgment also directed the receiver to apply the avails of said separate property to the payment of the said copartnership demand. *Held* that the judgment was erroneous, in the absence of any evidence that the separate debts of B. had been paid. *ib*

5. A participation in the profits of a business, by a party, as a compensation for his labor or services, without his having an interest in the principal stock, or in the profits as such, or any right to control the business, does not make him a partner. *Conklin* v. *Barton*, 445

6. He must have an interest in the stock, with a right to control, and thus have a right to the profits as the result of the capital and industry in which all concerned are interested, and not as a measure of compensation merely; and must be liable for losses. *ib*

7. Where an individual, though not actually a partner of, or connected in business with, another, by his acts and declarations holds himself out to a third person as a partner, and induces him to believe that he is such, and thereby goods are obtained on the credit of both, he will be estopped from denying the existence of a partnership, and will be liable as a partner. *ib*

8. What acts and declarations of an individual will amount to a holding of himself out to others as a partner. *ib*

9. After a witness has stated what he has seen and heard which tended to establish the existence of a co-partnership, it is competent to prove by him, negatively, that he has no knowledge or information to the contrary. *ib*

10. Where individuals are sued as partners, for goods sold to them in their business as hotel keepers, and the partnership is denied, a bond, purporting to have been executed by both defendants for the purpose of obtaining a tavern keeper's license, is admissible in evidence as tending to establish a partnership. *ib*

See Corporation, 4.
Debtor and Creditor, 10, 11.
Sheriff, 4.

PIERS.

The owners of a pier are liable for injuries sustained by an individual by reason of its defective construction and dangerous condition, notwithstanding the premises are, at the time, in the possession of a tenant who has covenanted to keep the pier in repair, if the defects existed when the owners leased the property to him. *Moody* v. *The Mayor &c. of New York*, 282

See Brooklyn, (City of,) 3.

POWER.

1. H. gave to his executors the sum of $100,000, in trust to pay over the income to his daughter, R., during her life, and in case she should have no children or grandchildren living at the time of her death, then in trust to pay over one half of such sum, viz. $50,000, to such person or persons, whether her husband or otherwise, as she might by last will and testament appoint. R. made a will by which she gave her husband $5,000, in general terms, and without any reference to the power of appointment given her by the will of her father. *Held* that the will was a valid execution of the power. *White* v. *Hicks*, 61

2. *Held, also*, that evidence as to the circumstances or condition of the property or fund in the hands of H.'s executors; to show that R.'s own savings or property was not sufficient to answer the special legacies bequeathed by her will; and of other extrinsic facts, as distinguished from what she said, at or about the time of executing her will, was properly received. *ib*

PRACTICE.

1. When a party relies upon erroneous decisions made upon a trial before a referee, it is not necessary to make and serve formal exceptions to the report of the referee. If it is claimed that the referee has erred in his legal conclusions, then the party must apprise his adversary of the ground of his objections, by serving exceptions, in the manner provided in the first clause of sec. 268 of the code of procedure. *Cowen* v. *The Village of West Troy*, 48

2. It is too late, at the trial, to object that the complaint and summons vary; that the summons is under the wrong subdivision of section 129 of the code of procedure, to justify the complaint filed and served. *Willet* v. *Stewart*, 98

3. That objection should be presented by motion, in order that an amendment may be made, on just terms. *ib*

4. A court can never be asked to charge upon the assumption of a fact not only not conceded, but which the testimony strongly tends to disprove. *Trask* v. *Payne*, 569

5. The rule that exceptions to a charge must be specific does not apply to a case where the judge excludes the defense on the opening of the defendant's counsel. *Sawyer* v. *Chambers*, 622

6. Where the judge excludes the whole defense, one exception to the decision is good. *ib*

See SUPPLEMENTAL COMPLAINT.

PRINCIPAL AND AGENT.

See BANKS AND BANKING.
BOND, 1, 2, 3.
INSURANCE.
NEW YORK, (CITY OF.)

PRINCIPAL AND SURETY.

1. A surety, who guaranties the punctual payment of "the interest" on a money bond not bearing interest by its terms, is liable for interest accruing after the bond becomes due. *Hamilton* v. *Van Rensselaer*, 117

2. Where a creditor receives the check or draft of the principal debtor, payable at a future day, in payment of the debt, without objection, and instead of returning it to the maker, forwards it to the bank for collection, if the check or draft is not absolute payment of the debt, the effect of the transaction is to extend the time of payment after the demand has accrued, during which time the creditor would be precluded from bringing an action to recover the amount, of the principal debtor; and if the extension is given without the consent of a surety, it discharges him from liability. *The Albany City Fire Ins Co.* v. *Devendorf*, 444

See SUBROGATION.

PROMISSORY NOTES.

1. The facts that a note sued on was made by the defendant without consideration, and was delivered to the payee solely for his accommodation, and that it was transferred by the payee to the plaintiff after it became due, will not, alone, constitute any defense. *Corbitt* v. *Miller*, 305

2. In an action by the indorsee of a promissory note, against the maker, the answer alleged that the note was made and given to O. for the purpose of enabling him to raise money to buy or pay a mortgage held by the plaintiff on property owned or claimed by O.; that the note was not used for that purpose, but remained in the hands of O. until after the same became due, and was then transferred to the plaintiff. *Held*, that if this could be deemed a misappropriation, in any sense, in order to render it available as a defense, the answer should have shown that it was, or might have been, injurious to the defendant. *ib*

3. But the answer merely alleging that it was expected and intended that the plaintiff should have the proceeds of the note, after it was negotiated, and that instead of the proceeds he had taken the note; *it was held*, that this was no misappropriation, within any of the cases. *ib*

4. In an action upon a promissory note, by the payees against indorsers, the court refused to allow the defendants to show that the note was given for goods to be delivered, and that such goods had never been delivered. *Held* erroneous. *Sawyer* v. *Chambers*, 622

See ACCOUNT.
NEW TRIAL.
PARTNERSHIP, 2.
SUBROGATION.

R

RAIL ROAD COMPANIES.

1. A rail road corporation, as a common carrier of goods, can by contract exempt itself from all liabilty for the loss of, or an injury to, goods, from negligence. *Lee* v. *Marsh*, 102

2. The plaintiffs made an agreement with the defendant as receiver of the Erie rail road, for the transportation of live stock, over the road. The contract exonerated the defendant from all liability for loss or damage that might happen from any other cause than willful negligence or fraud; and stated that the rate of freight to be paid by the plaintiffs had been reduced in consequence of their assuming these risks. *Held* that the defendant was not liable for damages to the plaintiffs' cattle arising from the cars being thrown off the track, where it was found, by the referee, that the occurrence was without any willful negligence on the part of the defendant or its agents. *ib*

3. Where animals, transported by rail road, were killed, by an accident for which the company was not liable, and the agents of the company offered to carry the dead stock through, if the owner, who accompanied the train and was present at the accident, would take charge of them, who refused to do so; *Held* that the owners had no claim to recover of the rail road company, on the ground that they had failed to deliver the carcasses of the dead animals. *ib*

4. Where property is delivered to a rail road company, to be transported by that and another company, over their respective roads, to its place of destination, it is enough for the owner, in an action against the company delivering the property, to recover damages for negligence, to show that he delivered the property to the first company in good order; and the burthen is then cast upon the company delivering the goods thus injured, of proving that they were not injured while in its possession, or that they came to its possession thus injured. *Smith* v. *The New York Central Rail Road Co.*, 225

5. The liability of a rail road company as a carrier of freight is for its own acts, or for injuries which such freight receives while it is in its custody for the purpose of transportation; and not for the acts of other companies which may have previously injured such freight. *ib*

6. The provision of the statute, that "whenever two or more rail roads are connected together, any company owning either of said roads receiving freight to be transported to any place on the line of either of said roads shall be liable as common carriers, for the safe delivery of such freight at such place," was intended to apply only to the company originally receiving and undertaking to convey and deliver the freight, and not to create any liability against any other company for an injury sustained by goods while in the possession of the company originally receiving them. *ib*

7. An intermediate carrier, who was not a party to the original undertaking is liable, *it seems*, only as an ordinary carrier, for loss or damage arising while the goods are in his possession as such carrier. *Per* JOHNSON, J. *ib*

8. This gives the owner his election, in case of loss or damage, to bring his action either against the carrier with whom the original undertaking was entered into, or against the particular carrier in whose hands the loss or injury has occurred. *Per* JOHNSON, J. *ib*

9. The latter is clearly liable for his own default, without any aid from the statute. *ib*

10. Where the plaintiff delivered to the Western Rail Road Company, in Massachusetts, whose road connected with that of the New York Central Rail Road Company, at Albany, goods to be transported to M. at Rochester, which goods were received by M. from the latter company, in a damaged condition; *Held*, that without further proof than that of the delivery of the

goods in good condition, to the Western Rail Road Company, the court would infer a delivery of the property, in the same condition, by that company, to the New York Central Rail Road Company to be transported by the latter company, as carrier, to Rochester; and that enough was proved to put that company upon its defense, and to authorize a recovery, in the absence of any counter evidence. *ib*

See DEATH BY WRONGFUL ACT, &c.

RECEIVER.

See CORPORATION, 10, 12.

RECRUITS.

See BOARD OF SUPERVISORS.
COUNTY.
COUNTY BONDS.
TOWN.

RECOUPMENT.

See VENDOR AND PURCHASER, 11.

RELEASE.

See INSURANCE, 21.

REFEREES.

1 A referee, being appointed by the court to perform certain duties, is one of its officers, and moneys in his hands being in the custody of the court, no action can be brought against him to recover those moneys, without the permission of the court. *Higgins* v. *Wright*, 461

2. Either leave must be obtained, for that purpose, or an application should be made by motion, for directions as to the disposition of the fund. *ib*

See HIGHWAYS.
PRACTICE, 1.

REMOVAL OF CAUSE TO CIRCUIT COURT OF THE UNITED STATES.

After a verdict has been rendered, and a judgment docketed, in a state court, with no defense under any act of congress interposed, upon the trial, the supreme court is not authorized to direct the removal of the cause to the circuit court of the United States, so as to enable that court to proceed and try the cause over again, the same as if it had been originally commenced therein and no previous trial had been had, or judgment rendered. *Patrie* v. *Murray*, 323

See CONSTITUTIONAL LAW, 3.

RES ADJUDICATA.

See FORMER SUIT.

RIOT.

See BROOKLYN (CITY OF,) 3.
CONSTITUTIONAL LAW, 1, 2.
MOB.

S

SATISFACTION.

See DEBTOR AND CREDITOR, 1.

SET OFF.

The equity to have one judgment set off against another can not arise until judgment is actually recovered in the second action. An assignment made previous to that event, transferring a legal, or even an equitable title, to the demand, will have the effect of preventing the right of set-off from accruing. *Mackey* v. *Mackey*, 58

See APPEAL.

SHERIFF.

1. It is a breach of a deputy sheriff's official bond if he fails to pay over

money collected by him on execution, even if the sheriff should never be sued, or made to pay the amount. *Willet* v. *Stewart*, 98

2. The deputy's liability depends solely upon his own omission to pay over to the sheriff, and not in any manner upon what becomes of the money after the sheriff receives it, or who is entitled to it. SUTHERLAND, J., dissented. *ib*

3. A sheriff is not responsible for such acts as the law requires him to perform. He could not execute the commands of process, either in the case of an execution or an attachment, without taking the manual possession of the property which he is required to seize. *Smith* v. *Orser*, 187

4. An action will not lie against a sheriff, as a wrongdoer, by all the members of a firm, a part of whom are the defendants in an attachment, on the ground that upon such attachment he has seized and taken into his custody property belonging to the plaintiffs collectively, as a partnership. *ib*

5. After a sheriff has seized property upon a warrant of attachment, and has advertised the same for sale upon an execution issued in the attachment suit, upon receiving an *indemnity* from the plaintiff, he is at liberty to return the execution *nulla bona*, on the property being taken out of his possession; provided he acts in good faith; but in so doing he assumes the responsibility of proving property out of the defendant in the execution, and thus supporting his return. *Lummis* v. *Kasson*, 373

6. In an action against the sheriff for a false return, in such a case, after the plaintiff has introduced evidence sufficient, *prima facie*, to establish property in the judgment debtor, and a levy thereon, the sheriff has a right to controvert such evidence, and to prove that such property did not belong to the judgment debtor, but to another person. *ib*

See ATTACHMENT.

ORDERS OF THE WAR DEPARTMENT.

SPECIFIC PERFORMANCE.

1. H. being the holder of a first mortgage made by L. to secure $12,000, the principal sum of which was then due and payable, at the option of H., in consequence of a default having been made in the payment of interest; and P. being the owner of the second mortgage on the same premises, made by L., which he was then foreclosing; P., in order to prevent the threatened foreclosure of the first mortgage, made an agreement with H., whereby, in consideration of H.'s waiving his option to consider the principal of the first mortgage due, he agreed, 1. To pay the interest, taxes and assessments in arrear; 2. To prosecute the foreclosure of the second mortgage; and 3. In the event of his buying the mortgaged premises, "in his own name or otherwise," at the foreclosure sale, subject to the first mortgage, to reduce the principal sum secured by the said first mortgage by paying $3000, on account thereof. At the foreclosure sale B. purchased the mortgaged premises, and took the sheriff's deed in his own name, at the instance and for the benefit of P., and with full knowledge of the agreement made by P., and for the purpose of enabling P. to evade the same. *Held*, 1. That the agreement made by P., was a lawful and valid agreement, for a sufficient and lawful consideration. 2. That the complaint showed a prima facie right in H. to come into a court of equity at least for the purpose of obtaining a decree declaring the sheriff's deed to B. to be fraudulent, inoperative and void, so far as it prevented the specific performance of the agreement of P. to reduce the first mortgage. 3. That a court of equity having jurisdiction for that purpose, it could proceed and decree a specific performance of the agreement of P. to reduce the first mortgage by paying $3000 on account thereof. CLERKE, J. dissented. *Livingston* v. *Painter*, 270

See INSURANCE.

STATUTES.

See FRAUDS, (STATUTE OF.)
LIMITATIONS, (STATUTE OF.)
MOB.
NATIONAL BANKS.

STOCK.

See NATIONAL BANKS.

STREETS.

See MUNICIPAL CORPORATIONS, 2 to 6.

SUBROGATION.

1. It is a general principle of equity that a surety, or a party who stands in the relation of a surety, is entitled to be subrogated to all the rights and remedies of the creditor against the principal whose debt he has been compelled to pay. *Higgins* v. *Wright*, 461

2. And where a person standing in the situation of a surety for the payment of a debt receives a collateral security for such payment, for his indemnity, the principal creditor is in equity entitled to the benefit of such collateral security; although he did not originally rely upon the credit of such collateral security, or know of its existence, in the first instance. *ib*

3. An accommodation maker of a promissory note, for whose benefit, in part, the note was given, can not claim an equitable right to a security which has been pledged to the person occupying the position of second indorser, for his special indemnity, after such second indorser has been absolutely discharged from liability. *ib*

4. In order to avail himself of the benefit of such security, it is essential that the maker of the note should have paid the debt for which he was liable. *ib*

5. If he fails to pay the debt, and the second indorser has been discharged from liability, the security pledged, to the latter by the first indorser, for his indemnity, will revert back to and become the property of the first indorser, and a subsequent assignment thereof by the second indorser to the maker, will convey no title. *ib*

SUBSCRIPTION PAPER.

See EVIDENCE, 1.

SUPERVISOR.

See BOARD OF SUPERVISORS.

SUMMARY PROCEEDINGS TO RECOVER THE POSSESSION OF LAND.

1. An affidavit of the service of a summons, under the statute relative to "Summary proceedings to recover the possession of land," which alleges a service upon an under tenant, on the demised premises, and that the tenant was absent from his last and usual residence, without stating that such residence was upon the demised premises, is insufficient. *The People, ex rel. Simpson*, v. *Platt*, 116

2. A demand of the rent claimed to be due, made of an under tenant, who is described in the affidavit as a person in possession of the demised premises, is not sufficient to give the justice jurisdiction. *ib*

3. The demand must be made of the tenant, or three days' notice requiring payment, or the possession of the premises, must be served in the manner specified in the statute for the service of the summons. *ib*

4. The affidavit which is the foundation of "summary proceeedings to recover the possession of lands" should make out a plain case, and should not be uncertain or contradictory. *The People, ex rel. Roberts*, v. *Mathews*, 168

5. If it shows neither the relation of landlord and tenant, nor that any particularly specified term of the defendant has expired, the summons will be unauthorized, and all subsequent proceedings void. *ib*

6. Where an affidavit of the service of the summons stated that the service was made by "leaving a true copy of the same with a person who said he belonged there, at *his* last or usual place of residence, with a person of mature age, who, at the time of said service, was on said premises and resided thereon, said tenant being then absent from his last or usual place of business;" *Held*, that the affidavit was defective, as not showing that the copy was left with a person of mature age at the last or usual place of residence of *the tenant*. *ib*

SUMMONS.

See PRACTICE, 2, 3.
SUMMARY PROCEEDINGS, &c.

SUPPLEMENTAL COMPLAINT.

The filing of a supplemental complaint for the purpose of reviving an action is a matter of right. A motion for leave to file such a complaint is unnecessary and improper. *Roach* v. *LaFarge*, 616

SURPLUS MONEYS.

See MORTGAGE.

SURROGATE.

1. The power of a surrogate to refer a matter in controversy, arising out of a claim presented to an executor or administrator, against the estate, under title 3, part 2, chapter 6, sec. 34 of the revised statutes, embraces both legal and equitable claims. *White* v. *Story*, 124

2. Although the surrogate's court is one of special and limited jurisdiction, and can only exercise such power as the statute confers, yet the authority to do certain acts, or to exert a certain degree of power, need not be given in express words, but may be fairly inferred from the general language of the statute; or, if it be necessary, to accomplish its objects, and to the just and useful exercise of the powers which are expressly given, it may be taken for granted. *Dubois* v. *Sands*, 412

3. The surrogate being authorized by the revised statutes to direct and control the conduct, and settle the accounts, of executors and administrators; to enforce the payment of debts and legacies; and to administer justice in all matters relating to the affairs of deceased persons according to the provisions of the statutes of this state; he has ample authority to compel executors to perform their duty by expending, for the benefit of infant legatees, the interest of a sum of money intrusted to them for that purpose, by the testator. *ib*

T

TAXES AND ASSESSMENTS.

1. The relator, being assessed for $3000 upon his banking house, $25,000 upon his capital stock, and $28,000 for personal property, including surplus earnings, less the value of his banking house, appealed from the assessment, and testified before the assessors that he had no personal property liable to taxation, except the capital stock of his bank, amounting to $25,000; that $10,000 of that amount was invested in United States six per cent bonds; and that his banking house formed a part of the capital of his bank. *Held* that it was the duty of the assessors, upon these facts, to amend their assessment roll by striking out $10,000 for the amount of the government securities, not taxable, forming a part of the capital of his bank. *The People, ex rel. Raplee*, v. *Reddy*, 529

2. *Held, also*, that as they had assessed his banking house as real estate, the amount of its valuation should also have been stricken out from the amount of the capital stock of his bank. *ib*

3. And that the whole amount assessed for personal estate, $25,000, should also have been stricken out; it being the duty of the assessors

to take the relator's statement under oath, upon that point, as true. *ib*

4. The provision, in the act of 1851, amending the statute relating to assessments and the collection of taxes, taking away the conclusiveness of the affidavit before required, and making it the duty of the assessors upon an application being made to reduce the value of real and personal estate, to examine the applicant under oath touching the value of his property, and then to fix the value thereof as shall be just, does not give the assessors any right to fix such value arbitrarily or capriciously. *ib*

5. They act judicially, in fixing such value, and are called upon to pass upon the evidence produced before them; and when they have no ground in such evidence, to fix a valuation different from that sworn to by the applicant for a reduction, they are bound to take and follow his statement under oath, as formerly. *ib*

6. Where assessors, in their return to a certiorari, state that they have delivered the assessment roll, duly certified, to the supervisor of the town, and that the same is not in their possession or control, the court has no power to render any judgment that can affect the assessment roll, or correct any errors; although it is satisfied there was clear error in the proceedings. *ib*

7. The only remedy of the person aggrieved, under such circumstances, *it seems*, is by an action against the county, to recover back the amount of the tax improperly assessed and levied. *ib*

See LANDLORD AND TENANT.
NATIONAL BANKS, 5 to 10.

TOWN.

1. A board of supervisors is authorized to allow the towns to borrow upon their own credit. But unless the board provides by resolution for the issuing of town bonds, or of bonds upon the sole credit of the towns, or of any town, bonds so issued by such towns, or any of them, will be unauthorized and invalid. *The People, ex rel. Rose*, v. *The Board of Supervisors of the County of Livingston*, 298

2. Town debts can only be lawfully authorized under the act of 1864, in the shape of town bonds; and such town bonds can only be issued by the town authorities after a vote of the town duly had at a regular town meeting, called and held for that purpose. *ib*

TRUST.

See HUSBAND AND WIFE, 1, 2.

V

VENDOR AND PURCHASER.

1. A vendor's lien upon the land sold, for the purchase money, can only be waived by taking collateral security, or by an express agreement to that effect. The party disputing the lien must show that the vendor agreed to rest on other security, and to discharge the lien. *Dubois* v. *Hull*, 26

2. The principle of equitable lien is founded on the presumed intention of the parties. *ib*

3. The law presumes an intention on the part of the vendor to retain his lien for the purchase money, and imposes upon the purchaser the burden of proving the contrary. *ib*

4. The plaintiff, by his agent, proposed to sell a piece of land to a corporation, and to receive in payment therefor stock of the company to a specified amount. A committee of the corporation made a report recommending the acceptance of this proposition, which was adopted; but no further steps were taken to pay for the land in stock, nor was any stock ever issued to the plaintiff, or to any person for his benefit. The plaintiff conveyed the land to the corporation, but the consideration money was never

paid. *Held*, that the circumstances of the case did not show a waiver of the vendor's lien for the purchase money. Nor did the fact that the vendor had put his demand, for the purchase money, into a judgment before attempting to enforce the lien, evince an intention to waive it. *ib*

5. At most, the obtaining of a judgment for the purchase money can only be regarded as a circumstance to show the intention of the vendor to waive the lien, bearing upon the question whether there was a waiver or not. *ib*

6. Where the vendor has recovered a judgment for the purchase money, it is no defense to an action to enforce his equitable lien, that he has not issued an execution upon the judgment. *ib*

7. If one undertakes to sell land knowing that he has no authority to convey, the question of good faith can not arise, and he can not claim, and is not entitled to, any protection upon that ground. *Brinckerhoff* v. *Phelps*, 469

8. If, under such circumstances, he assumes to sell without being in a situation to convey, and without the power to confer any title, he does it at his peril, and can not claim the protection of a vendor in good faith. *ib*

9. He violates his contract, and must be held responsible for the damage occasioned by a breach of it. *ib*

10. Where a vendor knows that he has no power to convey, and fails to disclose to the vendee his want of power, the case is clearly distinguishable from one where a party acts under an honest but mistaken belief that he has a good title, and does everything in his power to execute the contract. *ib*

11. Where a contract to convey land describes the grantor as "trustee, &c." but without stating for whom, this will not relieve him from personal responsibility, nor change the legal effect of his contract. *ib*

12. Although a purchaser, when sued for the price of goods sold, may set up a breach of warranty as a defense by way of recoupment, or counter-claim, yet he is not bound to do so, or be precluded from any claim or action in respect to it. *Barth* v. *Burt*, 628

13. He may, after the recovery of a judgment against him, for the price of the goods, bring an action against the vendor for breach of warranty. *ib*

14. A sale by an insolvent debtor of his whole stock in trade, upon credit, is not necessarily fraudulent against creditors. *Scheitlin* v. *Stone*, 634

VERDICT.

1. It is an intendment of the law that a verdict settles in favor of the prevailing party every question of fact litigated upon the trial. *Wolf* v. *The Goodhue Fire Ins. Co.*, 400

2. Courts are not to intend that the jury found either of the issues in favor of the unsuccessful party, for the purpose of overturning their verdict. On the contrary, they are required to hold that every issue was found against the unsuccessful party, if necessary to sustain the verdict. *ib*

3. But if the jury gave the plaintiff less than he was entitled to recover, upon the finding of the issues, that is an error of which the plaintiff, alone, can complain. If he submits to the verdict, the defendant can not be heard to insist that it shall be set aside because it is unjust to the plaintiff. *ib*

4. Where, in an action upon a policy of insurance, the defenses are that the insured set fire to the property himself, and that he was guilty of fraud and perjury in preparing the preliminary proofs, the fact that the plaintiff recovers a verdict for a sum less than the amount insured and claimed to be recovered, will afford no evidence that the jury meant to decide the issue of fraud against the plaintiff. *ib*

See ATTORNEY.

VOLUNTEERS.

See BOARD OF SUPERVISORS.
COUNTY.

W

WAIVER.

See AGREEMENT, 4.
INSURANCE, 16, 17, 19, 20.
PARTIES, 25.

WILL.

Competency of Testator.

1. Evidence held sufficient to warrant the setting aside of a will on the ground of mental delusion in the testator, in respect to the natural objects of his bounty. *The American Seamen's Friend Society* v. *Hopper*, 625

Construction of.

2. C. H. at the death of a testatrix, being indebted to her over $1700, her will contained the following clause: "I hereby direct that C. H. shall not be required to pay upon any part of his indebtedness to me anything more than the interest thereon for the term of five years after my decease." *Held* that this clause discharged or forgave the principal of C. H.'s indebtedness, requiring him to pay only the interest thereon for five years. *Bates* v. *Hillman*, 645

3. *Held, also*, that the testatrix having made a will, the presumption was that she did not intend to die intestate as to this portion of her estate. *ib*

See, also, *Martin* v. *Martin*, 172.
Mapes v. *Tyler*, 421.
Burhans v. *Haswell*, 424.
Sullivan v. *Mara*, 523.

Codicil.

4. If a paper purporting to be a codicil to a will is not executed with the formalties required by law, the fact that the same has been presented to the surrogate, with the will, evidence received in regard to it, and the paper recorded by the surrogate in connection with the will, will not add, in any way, to its force and validity as a codicil. *Burhans* v. *Haswell*, 424

5. If such a paper is defective and informal in all the essential particulars which constitute a legal testamentary disposition of property, the surrogate has no authority to act upon such a case; and though he formally admits the paper to probate, as a codicil, this will not add to its legality. *Per* MILLER, J. *ib*

6. Where heirs have called executors to an account and the account has been rendered upon the basis of a paper claimed to be a codicil to the will, and they have received money under its provisions and by color of the same as a valid instrument, whether they are not estopped from questioning its validity, or avoiding its effect as a part of the will of the testator? *Quære*. *ib*

7. Whether the children of one of the heirs, after having claimed and obtained from the executors the proceeds of a legacy given to such heir and his children, by the codicil, are in a situation to repudiate the alleged codicil, altogether? *Quære*. *ib*

See NEXT OF KIN.
POWER.

WITNESS.

1. When husband and wife are parties defendant in an action for a personal tort committed by the wife alone, she is competent to give evidence, as a witness, in her own behalf. *Hooper* v. *Hooper*, 292

2. A married woman, made a party to an action in connection with her husband, is within the spirit and reason as well as within the letter of section 399 of the code of procedure, as amended in 1857, which declares that "a party to an action or proceeding may be examined as a witness in his own behalf, the same as any other witness," &c. *ib*

3. The decision in *Marsh* v. *Potter*, (30 *Barb.* 506) approved. *ib*

WORK AND LABOR.

See AGREEMENT.

WRIT OF PROHIBITION.

1. The awarding of a writ of prohibition is discretionary. A judge of the supreme court may refuse to grant the writ, at chambers, or, which is the same thing, may revoke a writ which he has inadvertently issued. *The People, ex rel. The N. Y. Consolidated Stage Co.*, v. *N. Y. Common Pleas*, 278

2. The writ is granted by the superior courts of Westminster, and in New York by the supreme court alone, to prevent inferior courts from exceeding their jurisdiction. *ib*

3 Although the supreme court, in the exercise of its supreme superintending power over all other courts of original jurisdiction in the state, will issue the writ where visitorial or any other authority is usurped, it will refuse it where the general scope or purpose of action is within the jurisdiction of the inferior court; an overstepping of its authority, in a portion of its judgment, or any other error in its proceedings, being a ground of appeal or review, but not of prohibition. *ib*

4. The court of common pleas for the city and county of New York, being intrusted with equity powers in cases of fraud, as ample as those of the supreme court, has jurisdiction of an action to set aside, as fraudulent, an assignment made for the benefit of creditors, and to enjoin the assignee from holding possession of, or interfering with, the assigned property. *ib*

5. To grant a writ of prohibition, in such an action, would be an attempt to deprive the common pleas of a jurisdiction which the law, in its wisdom, has thought proper to give it. *Per* CLERKE, J. *ib*

END OF VOLUME FORTY-THREE.

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